United States Court of Appeals

for the Second Circuit

APPENDIX

74-1329

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United States Court of Appeals

For the Second Circuit

ISLAND CREEK COAL SALES COMPANY,

Plaintiff-Appellant,

v.

INDIANA-KENTUCKY ELECTRIC CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

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JOINT APPENDIX

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Attorneys for Plaintiff-Appellant
40 West 57th Street
New York, New York 10019
(212) 977-9700

CAHILL GORDON & REINDEL
Attorneys for Defendant-Appellee
80 Pine Street
New York, New York 10005
(212) 944-7400

UNITED STATES COURT OF APPEALS
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TABLE OF CONTENTS

	PAGE
Docket Entries	1a
Complaint	4a
Exhibit A—Coal Supply Agreement Dated December 19, 1966	10a1
Exhibit B—Letter Dated July 20, 1970 from Stonie Barker, Jr. to R. D. Dunlevy	10a49
Notice of Motion to Dismiss Complaint	11a
Affidavit of John Lansdale Sworn to March 26, 1973 in Support of Motion to Dismiss	12a
Exhibit A—Defendant's Submission to Arbitration Dated January 25, 1973	13a
Exhibit B — Joint Submission to Arbitration Dated June 10, 1971	14a
Affidavit of James G. Park Sworn to May 16, 1973 in Opposition to Defendant's Motion to Dismiss	18a
Exhibit A—Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966	21a
Reply Affidavit of Robert C. Maynard Sworn to June 4, 1973 in Support of Defendant's Motion to Dismiss	52a
Exhibit A—Letter Dated May 20, 1971 from Robert C. Maynard to James G. Park	54a

PAGE

Exhibit B—Letter Dated May 25, 1971 from James G. Park to Robert C. Maynard 55a

Exhibit C—Letter Dated June 10, 1971 from Robert C. Maynard to James G. Park 56a

Exhibit D—Letter Dated June 14, 1971 from James G. Park to Robert C. Maynard 57a

Reply Affidavit of Ralph Dunlevy Sworn to June 4, 1973 in Support of Defendant's Motion to Dismiss 58a

Exhibit A—Letter Dated September 16, 1969 from Island Creek Coal Sales Company to American Electric Power Service Corporation 61a

Exhibit B—Letter Agreement Dated November 24, 1970 Between Indiana-Kentucky Electric Corporation and Island Creek Coal Sales Company 63a

Exhibit C — Correspondence Relating to the Health and Safety Act Prior to June 10, 1971 65a

Opinion by Bauman, J. 90a

Judgment Dismissing Complaint 102a

DOCKET ENTRIES

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JUDGE BAUMAN Jury Demand Date: 73 CIV. 564

ISLAND CREEK COAL SALES COMPANY

Plaintiff,

-against-

INDIANA-KENTUCKY ELECTRIC CORPORATION

Defendant.

Attorneys - For Plaintiff:

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
477 Madison Avenue
New York City 10022 758-6700

For Defendant:

CAHILL, GORDON, REINDEL
80 Pine Street
New York City 10005 944-7400

DOCKET ENTRIES

DATE	PROCEEDINGS
Feb. 6-73	Filed complaint and issued summons
Feb. 6-73	Filed Affidavit of plaintiff by Simon Rose in support of a request that the summons be issued with a 30-day return date.
Feb. 14-73	Filed summons and entered marshal's return served on: Indiana-Kentucky Electric Corp by Ralph Dunlevy on 2-12-73 & Indiana-Kentucky Electric Corp by certified mail receipt #300150, on 2-7-73.
Mar. 9-73	Filed Stip and Order that the time for deft to answer the complaint is extended from 3-5-73 to 4-4-73. Bauman, J.
Apr. 4-73	Filed stip and order that the time for the deft. to answer the complaint is extended to 4/25/73, So Ordered Bauman J.
Apr. 11-73	Filed stip & order that the time for the deft. to answer the complaint is extended to 4/25/73. So Ordered Bauman J.
Apr. 27-73	Filed deft. Indiana-Kentucky Electric Corp's notice of motion, Re: Dismiss complaint ret before Bauman J. on 5/7/73.
Apr. 27-73	Filed deft. Indiana-Kentucky Electric Corp's memo of law in support of its motion.
May 7-73	Filed stip and order that the deft's motion to dismiss the complaint is adjourned to 6/1/73, So Ordered Bauman J.
May 21-73	Filed Pltffs affidavit by James G. Park, Esq.
May 21-73	Filed Pltffs memo of law in opposition to deft's motion to dismiss.
May 31-73	Filed deft's attys notice of change of name.
Jun. 6-73	Filed deft's affidavit by Robert C. Maynard
Jun. 6-73	Filed deft's reply memo

DOCKET ENTRIES

Jun. 6-73	Filed Deft's reply affidavit by Ralph Dunlevy.
Jun. 1-73	Filed stip and order that deft's motion to dismiss is hereby adjourned to 6/8/73, So Ordered Bauman J.
Jun. 18-73	Filed pltffs supplemental memo in opposition to deft's motion to dismiss.
Nov. 21-73	Filed Opinion #40038 that deft's motion for summary judgment is granted. On 6-10-71, pursuant to Article VI, Sec.12, the parties executed a joint submission to arbitration, which is set forth in full in the appendix to this opinion. I therefor conclude that Island Creek agreed to submit to arbitration the question of its right to terminate under Article IV,Sec.6. Accordingly, IKEC's motion for summary judgment dismissing the action must be granted. IT IS SO ORDERED. Bauman, J.
Feb. 26-74	Filed Stip and order extending pltfs. time to transfer the record to the U.S.C.A. until March 1-74. BAUMAN, J.
Mar. 11-74	Filed Stip and order extending plt#'s time to transfer the record to the U.S.C.A. until March 13-74. BAUMAN, J.

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiff, ISLAND CREEK COAL SALES COMPANY, by its attorneys, brings this action pursuant to Section 1332 of Title 28 United States Code seeking a declaratory judgment pursuant to Section 2201 of Title 28 United States Code, for the purpose of resolving an actual controversy between the parties hereto, and further seeking other relief pursuant to Section 2202 of Title 28 United States Code based upon such a declaratory judgment.

JURISDICTION

1. Plaintiff is a corporation incorporated under the laws of the State of Maine, having its principal place of business in Cleveland, Ohio.

2. Defendant is a corporation incorporated under the laws of the State of Indiana, having its principal place of business in a state other than the States of Maine or Ohio. Upon information and belief, defendant does business in the State of New York. Defendant transacted business within the State of New York out of which this cause of action arose in that, inter alia, the agreement referred to in paragraph 4 below was negotiated by

representatives of defendant in New York City and was executed by the president of defendant at his office therein.

3. The amount in controversy between the parties exceeds, exclusive of interest and costs, the sum of $10,000.00.

STATEMENT OF THE CONTROVERSY

4. The parties hereto entered into a valid, binding and legally enforceable "Coal Supply Agreement", dated December 19, 1966, (hereinafter "the said Agreement"), pursuant to the terms of which plaintiff was to sell coal to defendant from plaintiff's Hamilton No. 1 Mine located in the State of Kentucky. Performance under the said Agreement was to continue through December 31, 1982, with a right of extension by defendant of as much as five (5) additional years therefrom. A complete, true and correct copy of the said Agreement between the parties hereto is attached as Exhibit "A" and made a part hereof.

5. In Article VI, Section 12 of the said Agreement the parties thereto agreed to arbitrate certain disputes between them in accordance with the rules of the American Arbitration Association. Said Article provides:

> Except as to any matter expressly stated herein to be within the sole judgment of one of the parties hereto, any dispute, controversy or claim arising out of or relating to this Agreement shall be determined by arbitration in accordance with the Rules then obtaining of the American Arbitration Association; provided that neither party shall initiate arbitration proceedings until the expiration of thirty (30) days after notice of such dispute, controversy or claim shall have been given to the other party. Judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction. [Emphasis added]

6. Article IV, Section 6 of the said Agreement, in relevant part, provides as follows:

> The parties hereto also recognize the possibility that, during the continuance of this Agreement, legislative or regulatory bodies or the courts may impose regulations or restrictions relating to mining practices which will make it impossible or impractical for Seller to continue to produce coal for delivery hereunder. Such regulations or restrictions could pertain to, but would not necessarily be limited to, air pollution, water pollution, waste disposal or surface subsidence. If any such regulations or restrictions are imposed and if as a result thereof Seller in its sole judgment decides that it will be impossible or impractical for Seller to continue to produce coal for delivery hereunder, Seller shall so advise Buyer and thereupon Seller and Buyer shall promptly consider what corrective steps they can take in the mining and preparation of the coal at Seller's mine and in the handling and combustion of the coal at Buyer's plant; and if in Seller's sole judgment such steps will not, without unreasonable expense to Seller, make it possible for Seller to continue to produce coal for delivery hereunder without violating such regulations or restrictions. Seller shall have the right, upon notice to Buyer,

> to terminate this Agreement without further obligation to Buyer hereunder; provided, however, that Buyer may, at its option, prevent such termination by agreeing to reimburse Seller for such expense to the extent that Seller, in its sole judgment, deems such expense to be unreasonable. [Emphasis added].

7. On December 30, 1969 an Act of Congress, Public Law 91-173 of 1969, became law. This Act, which is known and cited as the "Federal Coal Mine Health and Safety Act of 1969," (hereinafter "the Act") became effective on March 30, 1970.

8. Following the imposition of the Act, plaintiff advised defendant that, as a result thereof, it was impossible or impractical for plaintiff to continue to produce coal under the said Agreement. Thereafter, plaintiff and defendant considered what corrective steps could be taken and plaintiff notified defendant that in plaintiff's sole judgment such steps would not, without unreasonable expense to plaintiff, make it possible for plaintiff to continue to produce coal under the said Agreement without violating the Act. Defendant did not agree to reimburse plaintiff for the additional expense which plaintiff, in its sole judgment, deemed unreasonable. By written notice to defendant dated July 20, 1972, a true and correct copy of which is attached as Exhibit "B" and made a part hereof, plaintiff terminated the said Agreement pursuant to

Article IV Section 6 thereof.

9. Pursuant to Article IV, Section 6 of the said Agreement, set forth in full paragraph 5 above, plaintiff's determination that the possible corrective steps would not make it possible, without unreasonable expense, for it to produce coal under the said Agreement without violating the Act was within its sole judgment and thus plaintiff's determination and its decision toterminate the said Agreement is not a dispute, controversy or claim which plaintiff agreed to submit to arbitration pursuant to Article VI, Section 12 of the said Agreement.

10. On June 22, 1971, a Submission to Arbitration dated June 10, 1971 was filed with the Cleveland, Ohio regional office of the American Arbitration Association. The controversy between plaintiff and defendant so submitted to arbitration concerned the quantity of coal plaintiff was then obligated to deliver to defendant during the years 1970 and 1971 under the said Agreement then in existence between the parties.

11. In the controversy pending before the American Arbitration Association counsel for defendant has requested arbitration of plaintiff's decision to terminate the said Agreement made pursuant to Article IV, Section 6

thereof, an issue which is not arbitrable pursuant to Article VI, Section 12 of the said Agreement.

WHEREFORE, plaintiff prays that this Court:

(1) entertain this action and speedily resolve this actual controversy between the parties;

(2) adjudge and declare that plaintiff's decision to terminate the said Agreement pursuant to Article IV, Section 6 is not arbitrable by the American Arbitration Association pursuant to Article VI, Section 12 of the said Agreement;

(3) enter an order prohibiting defendant from requesting arbitration of the issue of termination by plaintiff;

(4) adjudge and declare that as of July 20, 1972, the date of termination of the said Agreement, plaintiff had no further obligation to defendant thereunder;

(5) order that defendants pay the costs of this action; and

(6) grant plaintiff such other and further relief as may be just and equitable.

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Attorneys for Plaintiff

By s/ Simon Rose
A Member of the Firm
Office and P.O. Address
477 Madison Avenue
New York, New York 10022
(212) 758-6700

Of Counsel
BUCHANAN, INGERSOLL, RODEWALD,
KYLE & BUERGER
1800 Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 562-8800

Exhibit "A" - Coal Supply Agreement dated December 19, 1966 - Annexed to Complaint

10 a-1

COAL SUPPLY AGREEMENT

between

INDIANA-KENTUCKY ELECTRIC CORPORATION

and

ISLAND CREEK COAL SALES COMPANY

Dated December 19, 1966

Exhibit "A" - Coal Supply Agreement dated December 19, 1966 - Annexed to Complaint

10 a-2

TABLE OF CONTENTS

Article	Subject	Page
	DATE OF AGREEMENT	1
	PARTIES	1
	RECITALS	1
I.	TERM	3
Sec. 1	Term	3
Sec. 2	Extension of Term	3
II.	DELIVERY	4
Sec. 1	Equal monthly and weekly quantities	4
Sec. 2	Delivery point	4
Sec. 3	Buyer's Barging Agreement	4
Sec. 4	Barge loading requirements	5
Sec. 5	Shipping notices	5
III.	QUANTITY	6
Sec. 1	Base Quantities and Changes Therein	6
Sec. 2	Ton defined	6
IV.	SPECIFICATIONS AND QUALITY	7
Sec. 1	Source, size and other physical properties of the coal	7
Sec. 2	Seller's right to supply substitute coal	7
Sec. 3	Quality of the coal	8
Sec. 4	Rejection of coal	8
Sec. 5	Discontinuance of deliveries	9
Sec. 6	Effect of restrictions on air pollution and mining practices	10
V.	PRICE	12
Sec. 1	Base Prices	12
Sec. 2	Price Revisions to compensate for changes in Seller's costs	13
Sec. 3	Sharing of productivity improvement	17
Sec. 4	Changes in economic conditions and market prices	18
Sec. 5	Effect of laws fixing coal prices	19
Sec. 6	Adjustments of Base Prices to compensate for changes in calorific value	20
Sec. 7	Production employee,-employees, defined	21

Article		Subject	Page
VI.		GENERAL PROVISIONS	22
	Sec. 1	Billing and Payments	22
	Sec. 2	Weights	23
	Sec. 3	Sampling and Analyses	24
	Sec. 4	Weighted Averages	26
	Sec. 5	Force Majeure	27
	Sec. 6	Coal Reserves	28
	Sec. 7	Destination of Coal	29
	Sec. 8	Records and Audits	33
	Sec. 9	Mining Facilities	34
	Sec. 10	Price Limitation	35
	Sec. 11	Employee Interest	35
	Sec. 12	Arbitration	36
	Sec. 13	Notices	36
	Sec. 14	Waivers and Remedies	37
	Sec. 15	Successors and Assigns	38
	Sec. 16	Integration	39
	Sec. 17	Interpretation	39
	Sec. 18	Provisions of AEC Power Agreement	39
		SIGNATURES OF PARTIES	43
		Composite Index	Annex A

Exhibit "A" - Coal Supply Agreement dated December 19, 1966 - Annexed to Complaint

THIS AGREEMENT, made this 19th day of DECEMBER, 1966, between INDIANA-KENTUCKY ELECTRIC CORPORATION, an Indiana corporation (herein called "Buyer"), and ISLAND CREEK COAL SALES COMPANY, a Maine corporation (herein called "Seller");

WITNESSETH THAT:

WHEREAS, Buyer owns and operates an electric power plant known as the Clifty Creek Plant, including a coal unloading dock, located on the right bank of the Ohio River near Madison, Indiana, about 560 miles downstream from Pittsburgh, Pennsylvania, which plant requires and consumes large quantities of bituminous coal; and Buyer desires to secure an assured and dependable supply of coal for said plant; and

WHEREAS, Seller represents and agrees that it is affiliated with Island Creek Coal Company, a Delaware corporation (herein also referred to as "Seller" where the context so requires); that Island Creek Coal Company is an experienced coal producer engaged in the commercial production of coal; that Island Creek Coal Company owns or controls in the Grundy Knob area adjacent to the Ohio River and south of its present mine near Uniontown, Kentucky, reserves of bituminous coal adequate for the purposes of this Agreement; that Island Creek Coal Company will develop in said coal reserves a new mine, to be known as the Hamilton No. 1 Mine, including a coal loading dock located on the left bank of the Ohio River about 852 miles

downstream from Pittsburgh, from which it will produce and Seller will supply the coal called for by this Agreement; that Island Creek Coal Sales Company is duly authorized to contract to sell said coal as hereinafter set forth; and that, even though Island Creek Coal Company is to be the producer of said coal, Island Creek Coal Sales Company hereby binds and obligates itself for the full and faithful performance of all of the covenants, obligations and duties herein stated to be observed and performed by Seller, and as to the correctness of all warranties and representations herein made by Seller, and

WHEREAS, Buyer's affiliate, Ohio Valley Electric Corporation (herein called "OVEC") has entered into a power agreement dated October 15, 1952, with the United States of America, acting by and through the United States Atomic Energy Commission (herein called "AEC"), whereunder OVEC supplies electric power and energy from Buyer's said plant to AEC's Project near Portsmouth, Ohio (which power agreement, as amended, is herein called the "AEC Power Agreement"), and a copy of the AEC Power Agreement has been furnished to Seller,

NOW, THEREFORE, in consideration of the foregoing and the covenants and agreements of the parties hereto as herein stated, Seller hereby agrees to sell and deliver and Buyer hereby agrees to purchase, accept and pay for coal of the quantity and quality hereinafter stated, during the period, at the prices, and upon the other terms and conditions herein set forth:

ARTICLE I.

Term

Section 1. Coal shall be sold and purchased under this Agreement during the period beginning on the first day of the month in which coal is first delivered hereunder and ending on December 31, 1982. It is expected that the first deliveries of coal hereunder will be required about JUNE 1, 1968. At least three months in advance of the date on which Seller proposes to start deliveries, the parties hereto shall confer and mutually agree upon the actual date on which deliveries shall start, taking into consideration Seller's ability to deliver coal from said mine and Buyer's ability to utilize coal at said plant. In any event, deliveries shall start not earlier than MARCH 1, 1968, and not later than SEPTEMBER 1, 1968.

Section 2. Buyer shall have the right to extend the term of this Agreement for an additional period of five (5) years, or such lesser period as Seller's estimated remaining uncommitted reserves in the No. 9 Seam at Seller's said mine as of June 30, 1981, will permit, provided Buyer gives Seller written notice of such extension prior to June 30, 1981.

ARTICLE II

Delivery

Section 1. Subject to the other provisions of this Agreement and taking into account the development of Seller's said mine and the regularly scheduled vacation periods for labor at said mine, the coal shall be delivered hereunder in substantially equal monthly quantities and in approximately equal weekly quantities during the month.

Section 2. The coal delivered hereunder shall be loaded by Seller into barges provided by Buyer at Seller's said coal loading dock and properly consigned by Seller for transportation via the Ohio River to Buyer at said plant. This shall constitute delivery to Buyer and thereupon the title to the coal shall pass to Buyer.

Section 3. Buyer represents that it has entered into an agreement with The Southland Towing Company, Inc. (herein called "Barge Company") whereby Barge Company has agreed to transport the coal to be delivered hereunder from said coal loading dock to said plant, to provide a sufficient number of barges, maintained in a good and seaworthy condition, and adequate motive power to enable Barge Company to carry out its obligations under said agreement without delay and in a workmanlike manner, and to deliver empty barges to said coal loading dock free of foreign matter; and Buyer agrees that it shall, at its expense, furnish or cause Barge Company to furnish barging facilities adequate to permit orderly fulfillment of this Agreement.

Section 4. Seller shall provide and maintain adequate harbor facilities at said coal loading dock and shall load the coal into the barges with its facilities in a workmanlike manner to a draft specified by Barge Company; the foregoing and the holding of the barges at said dock to be done at the cost and expense of Seller; it being understood, however, that it is Barge Company's exclusive responsibility to tie up and secure the barges at the time of delivery thereof to said dock. Seller shall have the right, but shall not be obligated, to refuse to load any barges it considers unseaworthy or any barges containing foreign matter.

Seller represents and covenants that it will install at its said coal loading dock facilities capable of loading the coal into 1500-ton barges at the rate of 4000 tons per hour, provided that such barges are properly placed alongside said coal loading dock and properly moved past Seller's stationary loading equipment with motive power furnished by Barge Company; that it will operate said facilities at any time during the day or night, 7 days of each week during 50 weeks of each calendar year, as may be required to expedite the loading of the barges; and that it will cooperate with Buyer and Barge Company to facilitate the efficient and economical transportation of the coal.

Section 5. For each shipment of coal hereunder, Seller shall promptly mail to Buyer a shipping notice, on Seller's regular commercial form, showing the barge numbers, size and weight of the coal in each barge if weighed by Seller, and the shipping date. Seller shall send a copy of each such notice to Barge Company.

ARTICLE III

Quantity

Section 1. The quantity of coal to be delivered hereunder during each of the periods hereinafter stated shall be:

(a) 500,000 tons during the period between the date on which deliveries commence hereunder and the end of 1968,

(b) 1,000,000 tons during the year 1969,

(c) 1,500,000 tons during the year 1970,

(d) Not less than 2,125,000 nor more than 2,500,000 tons during the year 1971 and each calendar year thereafter.

On or before November 1, 1970, Buyer shall give Seller notice of the rate at which deliveries shall begin on January 1, 1971, within the limits specified in (d) above; and Buyer shall have the right at any time and from time to time after January 1, 1971, to change the quantity and the rate of delivery thereof within the limits specified in (d) above, provided that Buyer shall give Seller not less than sixty (60) days' notice of each such change, and each such change shall continue in effect during the twelve-month period following its effective date.

Section 2. The term "ton" as used herein shall mean a net ton of 2,000 pounds avoirdupois weight.

ARTICLE IV

Specifications and Quality

Section 1. The coal delivered hereunder shall be raw or partially washed coal produced at Seller's said mine from the West Kentucky No. 9 Seam and shall be crushed by Seller to a top size not larger than 1-1/4 inches. It shall be reasonably free from extraneous materials and reasonably free-flowing when loaded into the barges.

Section 2. Subject to all the other terms, provisions and conditions of this Agreement, Seller shall have the right to supply substitute coal hereunder from said No. 9 Seam or any other seam at said mine or any other mine of Seller, provided that such substitute coal reasonably conforms to the specifications and quality set forth in Sections 1 and 3 of this Article IV, and provided that the supplying of such substitute coal shall not result in an increase in the cost to Buyer.

As used in this Section 2, the phrase "cost to Buyer" means an amount equal to the sum of the price Buyer would otherwise have paid to Seller for the coal delivered hereunder plus the price Buyer would otherwise have paid for transporting the coal from Seller's above-mentioned coal loading dock to Buyer's said plant.

Section 3. The coal delivered hereunder shall, "as received" at Buyer's said plant, be of a quality and have characteristics substantially equal to or better than the following characteristics:

Moisture content	8.00%
Ash content	13.50%
Sulfur content	3.70%
Calorific value	11,400 Btu's per pound
Ash Softening Temperature in Reducing Atmosphere	2,040° F.
Grindability (Hardgrove Index)	58

Section 4. Buyer shall have the right to reject all or any part of any shipment of coal for which the sampling and analyses mentioned in Section 3 of Article VI show any characteristics that are greater than the maximum or less than the minimum limits in the following tabulation:

Moisture content	12.00% maximum
Ash content	16.00% maximum
Sulfur content	4.25% maximum
Calorific value	10,700 Btu's per pound minimum
Ash Softening Temperature in Reducing Atmosphere	1,950° F. minimum 2,500° F. maximum
Grindability (Hardgrove Index)	50 minimum

Any coal so rejected by Buyer shall be removed by and/or at the expense of Seller immediately after Buyer notifies Seller of such rejection. If Seller fails to so remove any such coal, Buyer shall have the right to treat such coal as abandoned by Seller and, without liability to Seller, to remove such coal from Buyer's unloading dock. Seller shall reimburse Buyer for the price paid for and for all expenses occasioned to Buyer by such coal, including but not limited to all transportation charges Buyer has in any way incurred with respect to such coal. If, however, Buyer retains any such coal, then the price to be paid by Buyer for such retained coal shall be a reasonable price for coal of such quality as shall be mutually agreed upon by the parties hereto.

Section 5. If the coal delivered hereunder consistently fails to measure up to any or all of the specifications and/or characteristics set forth in Sections 1 and 3 of this Article IV, Buyer shall have the right, upon giving Seller notice of such failure, to discontinue acceptance of deliveries hereunder and to require that Seller take, at Seller's expense, whatever steps are necessary to insure that the coal delivered thereafter will substantially conform to said specifications and characteristics. In order to comply with such requirement, Seller shall have the right to supply substitute coal in accordance with the provisions of Section 2 of this Article IV.

Section 6. The parties hereto recognize the possibility that, during the continuance of this Agreement, legislative or regulatory bodies or the courts may impose regulations or restrictions relating to air pollution which will make it impossible or impractical for Buyer to utilize the coal thereafter to be delivered hereunder. Such regulations or restrictions could pertain to, but would not necessarily be limited to, sulfur. If any such regulations or restrictions are imposed and if as a result thereof Buyer in its sole judgment decides that it will be impossible or impractical for Buyer to utilize the coal to be delivered hereunder, Buyer shall so advise Seller and thereupon Buyer and Seller shall promptly consider what corrective steps they can take in the mining and preparation of the coal at Seller's mine and in the handling and combustion of the coal at Buyer's plant; and if in Buyer's sole judgment such steps will not, without unreasonable expense to Buyer, make it possible for Buyer to utilize the coal thereafter to be delivered hereunder without violating such regulations or restrictions, Buyer shall have the right, upon notice to Seller, to terminate this Agreement without further obligation to Seller hereunder; provided, however, that Seller may, at its option, prevent such termination by agreeing to reimburse Buyer for such expense to the extent that Buyer, in its sole judgment, deems such expense to be unreasonable.

The parties hereto also recognize the possibility that, during the continuance of this Agreement, legislative or regulatory bodies or the courts may impose regulations or restrictions relating to mining practices which will make it impossible or impractical for Seller to continue to produce coal for delivery hereunder. Such regulations or restrictions could pertain to, but would not necessarily be limited to, air pollution, water pollution, waste disposal or surface subsidence. If any such regulations or restrictions are imposed and if as a result thereof Seller in its sole judgment decides that it will be impossible or impractical for Seller to continue to produce coal for delivery hereunder, Seller shall so advise Buyer and thereupon Seller and Buyer shall promptly consider what corrective steps they can take in the mining and preparation of the coal at Seller's mine and in the handling and combustion of the coal at Buyer's plant; and if in Seller's sole judgment such steps will not, without unreasonable expense to Seller, make it possible for Seller to continue to produce coal for delivery hereunder without violating such regulations or restrictions, Seller shall have the right, upon notice to Buyer, to terminate this Agreement without further obligation to Buyer hereunder; provided, however, that Buyer may, at its option, prevent such termination by agreeing to reimburse Seller for such expense to the extent that Seller, in its sole judgment, deems such expense to be unreasonable.

ARTICLE V

Price

Section 1. The Base Price to be paid by Buyer to Seller for coal delivered and accepted hereunder during each of the periods hereinafter stated shall be as follows, f.o.b. barges, at Seller's said coal loading dock:

(a) $3.60 per ton during the period between the date on which deliveries commence hereunder and the end of 1969,

(b) $3.55 per ton during the year 1970,

(c) $3.50 per ton during the year 1971 and each calendar year thereafter.

The actual price to be paid hereunder during each of said periods shall be the applicable Base Price as the same may be increased or decreased pursuant to the following provisions of this Article V.

Section 2. The prices shall be revised from time to time in the manner hereinafter set forth to compensate for changes occurring in Seller's cost of production hereunder:

(a) In the event a change occurs after September 1, 1966, in the daily wage cost per union production employee at Seller's said mine resulting from a change in the requirements of any labor agreement entered into by Seller with the United Mine Workers of America (UMWA) or any similar labor organization representing its production employees at said mine (including the daily cost of changes which occur in wage rates, vacation, holiday and shift differential pay, terms and conditions of employment, working practices, fringe benefits and other labor cost factors) the cumulative sum of such changes occurring after September 1, 1966, shall be divided by the larger of (i) the actual productivity at Seller's mine in the 12-month period immediately preceding the effective date of the most recent change in daily wage cost, or (ii) 45 (being the projected output in tons per union production employee per day); and 134% of the result of such division shall be added to or subtracted from, as the case may be, the price per ton then in effect in lieu of any such previous price revision. Actual productivity, as herein referred to, shall be determined by dividing the number of tons of coal produced from Seller's said mine in the 12-month period immediately preceding the effective date of the pertinent change by the man-days actually worked at said mine in said period by all of Seller's production employees who are union members.

The meaning of "production employee" and "production employees" as those words are used in this subsection (a) is defined in Section 7 of this Article V.

(b) In the event a change occurs after September 1, 1966, in the amount per ton which Seller is required to pay into the UMWA Welfare and Retirement Fund (or any similar successor fund of general applicability in District 9) the exact amount of such change shall be added to or subtracted from, as the case may be, the price per ton then in effect. The amount required to be paid into said Fund as of September 1, 1966, was $0.40 per ton.

(c) With respect to changes occurring after September 1, 1966, in the taxes on or relating to the ownership, mining or sale of the coal to be delivered hereunder (including social security, unemployment compensation and other taxes on employment in connection therewith): (i) if a new type of tax is imposed, or (ii) an existing tax is repealed, or (iii) a change occurs in the tax rates or assessment ratios, then the annual cost thereof per ton shall be computed and such cost shall be added to or subtracted from, as the case may be, the price per ton then in effect. The provisions of this subsection (c) shall not apply to taxes imposed on or measured by income (except in the event and to the extent of a change in allowable depletion deductions).

(d) Price revisions to compensate for changes in the cost of materials and supplies (exclusive of electric power) shall be determined as follows:

(i) There shall be no price revisions prior to January 1, 1969, to compensate for any changes which occur in the cost of materials and supplies.

(ii) During the remainder of the term of this Agreement such price revisions shall be based on changes in the Index Number for the composite index constructed as set forth in Annex A hereto. Using such composite index number for June and December of each year, the percentage of change in said index from the level of such index for June, 1968, shall be determined semiannually; said percentage of change shall be multiplied by $0.89; the resulting amount shall be added to or subtracted from (as the case may be) the price per ton then in effect in lieu of any previous price revision made pursuant to this subsection (d); and each such new price revision shall be effective for deliveries made after the end of the month for which the composite index number is computed and shall continue until the end of the next succeeding June or December as the case may be; provided that, in the event that the total price increase per ton resulting from the application of said composite index in the above formula during any period of three successive

years following the first year in which such index is used exceeds by more than 10% the actual cost increase per ton for materials and supplies during such period of three successive years as determined under subsection (e) of this Section 2, then, at Buyer's option, the index to be used thereafter in said formula for purposes of this subsection (d) shall be the Wholesale Price Index, All Commodities Other Than Farm and Foods, published by the United States Department of Labor, Bureau of Labor Statistics, and the operation of said subsection (e) shall thereafter be suspended with respect to materials and supplies.

(e) Anything in this Section 2 to the contrary notwithstanding, the amount of any price increase made pursuant to this Section 2 shall not exceed the amount per ton of increase in the pertinent cost actually experienced by Seller in producing, selling and delivering the coal hereunder as a result of a change in an item of cost referred to in subsections (a) through (d) of this Section 2, provided that, in the case of materials and supplies, this provision shall not be applicable until the year 1970. The production, sale and delivery of coal under this Agreement shall at all times be conducted efficiently and economically and in such manner that increases in the cost thereof shall be kept to a minimum consistent with good operating practices.

(f) The foregoing price revisions shall be computed and applied in cents per ton to the nearest 1/10th of a cent. Except as stated above in this Section 2, each such price revision shall become effective as of the effective date of the change resulting in that revision. Seller shall promptly furnish proof satisfactory to Buyer or to the auditors provided for in Section 8 of Article VI of the amount of each such price revision, and the amount thereof shall become payable upon Seller furnishing such proof.

Section 3. The prices shall be reduced from time to time to reflect any reduction in production costs at Seller's said mine resulting from improvements in the art of mining, in accordance with the following provisions of this Section 3. As soon as practicable after the end of each calendar year during the continuance of this Agreement, the parties hereto shall determine the actual productivity at said mine during that calendar year. If such actual productivity exceeds 46 tons per union production employee per day, and if it has increased since the last previous price deduction made pursuant to this Section 3, then the following calculations shall be made: The amount of any increase in depreciation charges per union production employee per day on the pertinent books of Seller at the end of that calendar year over such charges 24 months previously shall first be determined and added to $29.80 (the initial daily average wage cost per union production employee in mining the coal delivered hereunder);

the sum thus obtained shall be divided by such actual productivity; the quotient thus obtained, if less than $0.648, shall be subtracted from $0.648 ($29.80 divided by 46); and one-half of the amount thus obtained shall be deducted from the price then in effect in lieu of any previous price deduction made pursuant to this Section 3. Any amount thus deducted from the price shall remain in effect until a subsequent deduction is made pursuant to this Section 3.

Actual productivity, as herein referred to, shall be determined by dividing the number of tons of coal produced from Seller's said mine in such calendar year by the man-days actually worked at said mine in that calendar year by all of Seller's production employees who are union members.

The meaning of "production employee" and "production employees" as those words are used in this Section 3 is defined in Section 7 of this Article V.

Section 4. From time to time during the term of this Agreement, but not more often than once every four years, the parties hereto shall jointly consider (a) the effect on Seller of economic conditions and (b) the effect on Buyer of market prices in the coal industry and shall consider

whether the price then being paid under this Agreement should be adjusted. If it is agreed that a substantial change has occurred in economic conditions and/or in market prices in the coal industry, then the price to be thereafter paid under this Agreement shall be adjusted to compensate for such change or changes, in such amount as may be mutually agreed upon by the parties hereto.

The intent of this Section 4 is to avoid having Seller experience a significant loss as a result of changed economic conditions and to avoid having Buyer pay Seller a price significantly higher than the prevailing market prices for coals of a similar quality and specifications produced in the Ohio River Valley Market area and sold on comparable terms.

Section 5. In the event the price of coal is fixed by law and such fixed price conflicts with the price specified in this Agreement, then the parties hereto shall join in a petition to the proper governmental authority to have this Agreement declared exempt from such law and/or to have the price specified in this Agreement approved. If such petition is denied and if the fixed price is such as to result in a decrease of more than ten cents (10¢) per ton in the price then in

effect, then Seller shall have the right to terminate this Agreement upon two (2) months' written notice to Buyer of such termination, unless Buyer lawfully may and does agree to compensate Seller for the difference between such fixed price and the price Buyer would have paid if such fixed price had not been imposed. If such petition is denied and if the fixed price is such as to result in an increase of more than ten cents (10¢) per ton in the price then in effect, then Buyer shall have the right to terminate this Agreement upon two (2) months' written notice to Seller of such termination, unless Seller lawfully may and does agree to compensate Buyer for the difference between such fixed price and the price Seller would have received if such fixed price had not been imposed.

Section 6. The Base Prices stated in Section 1 of this Article V are based upon coal having a calorific value of 11,400 Btu's per pound, "as received" at Buyer's Clifty Creek Plant. Whenever the half-monthly weighted average calorific value of the coal is more than 11,500 Btu's per pound or less than 11,300 Btu's per pound, then the price shall be adjusted to compensate for such variation in calorific value as follows:

(i) to or from the applicable Base Price stated in Section 1 of this Article V there shall be added or subtracted, as the case may be, the net amount of all price revisions made up to the beginning of such half-month pursuant to the provisions of Sub-sections (a) and (d) of Section 2 of this Article V;

(ii) the sum thus obtained shall be multiplied by such half-monthly weighted average calorific value;

(iii) the product thus obtained shall be divided by 11,400;

(iv) to or from the amount resulting from that division there shall be added or subtracted, as the case may be, the net amount of all price revisions made up to the beginning of such half-month pursuant to Subsections (b) and (c) of Section 2 of this Article V; and

(v) the resulting amount shall be the actual price to be paid for the coal delivered during said half-month.

Section 7. As used in Sections 2 and 3 of this Article V the words "production employee" and "production employees" refer to the class of Seller's employees at said mine who are union members directly engaged in operating, maintenance and repair work in the production, preparation and loading of coal, which class does not and shall not include foremen or any supervisory, engineering, technical, professional or clerical personnel.

ARTICLE VI

General Provisions

Section 1. Billing and Payments.

For all coal delivered and accepted hereunder from the 1st through the 15th day of each month Seller shall render a proper invoice to Buyer on or before the 20th day of that month and Buyer shall pay to Seller the net amount of that invoice on or before the 25th day of that month; and for all coal delivered and accepted hereunder from the 16th through the last day of each month Seller shall render a proper invoice to Buyer on or before the 5th day of the following month and Buyer shall pay to Seller the net amount of that invoice on or before the 10th day of said following month. Payments shall be made in United States Funds and Buyer may at its election pay by cash or check.

To the extent practicable, each invoice shall show, for the period for which it is rendered, the quantity of coal delivered and accepted hereunder determined in accordance with Section 2 of this Article VI, the weighted average calorific value thereof determined in accordance with Section 4 of this Article VI, the price applicable thereto, and any debits or credits due for which the amounts have been ascertained.

In the event it is necessary for purposes of any invoice to estimate the quantity of coal delivered and accepted hereunder, or its calorific value, accurate figures shall be obtained as soon as possible and the amount of the invoice recomputed. In the event revision of the price is required pursuant to Article V but the amount of such revision has not been ascertained prior to the preparation of the invoice for any half-month, thus preventing accurate computation of the applicable price for that half-month, then the applicable price for that half-month shall, for the purposes of the preparation of that invoice, be assumed to be the same as the applicable price for the last preceding half-month for which the price was accurately computed, and payment shall be made on that tentative basis. As soon as possible thereafter the accurate price of the coal for which such assumption was made shall be computed. Any sum determined to be due by any such computation or recomputation shall be paid to the party to whom it is due, either by separate payment made within five (5) days after the amount thereof is thus determined or by credit or debit on subsequent invoices, as the party to whom it is due may elect.

Section 2. Weights.

The coal delivered and accepted hereunder shall be weighed by Buyer at its expense on scales at said plant as the coal is unloaded from the barges; and Buyer shall promptly

inform Seller of the weights as thus determined. Seller shall have the right to have a representative present at any and all times to observe the weighing of the coal.

The results of the weighing by Buyer shall be accepted as the weights of the coal delivered and accepted hereunder; provided, however, that if the Seller should at any time question the accuracy of the weights thus determined, Seller shall so advise Buyer and Buyer shall permit Seller's representatives to test Buyer's scales. Such tests shall be made promptly, and if such tests show Buyer's scales to be in error they shall be adjusted to an accurate condition; provided, however, that, if Buyer and Seller are unable to agree upon such tests and adjustments or the methods thereof, the scales shall be tested and adjusted to a condition of accuracy by a commercial testing laboratory, mutually chosen, and the cost of the testing and adjusting by such laboratory shall be shared equally between Buyer and Seller. In any such case the weights of the coal previously delivered and accepted hereunder shall be corrected and appropriate adjustments made therefor retroactive to the date on which Seller gave Buyer written notice that the scales were to be tested as aforesaid.

Section 3. Sampling and Analyses.

A representative number of samples shall be taken by Buyer from each tow of coal delivered and accepted hereunder before it is commingled with other coal and approximately at the time it is weighed. Buyer shall determine, by proper analyses made

in its laboratory and at its expense, the quality and characteristics of the coal "as received" at Buyer's plant; and Buyer shall promptly inform Seller of the quality and characteristics as thus determined. The sampling and analyses shall be performed in accordance with methods approved by the American Society for Testing and Materials (ASTM) and Buyer and Seller shall agree on alternates within the ASTM standards or on other methods. Seller shall have the right to have a representative present at any and all times to observe the sampling and take check samples at the plant of Buyer; and Seller may also analyze the coal either from its own samples or from samples taken by Buyer. For this purpose Buyer shall retain, for a period of fifteen (15) days after Buyer has informed Seller of Buyer's analysis of such coal, 1/2 of each laboratory sample for analysis by Seller or by a commercial testing laboratory as hereinafter set forth.

The results of the sampling and analyses by Buyer shall be accepted as the quality and characteristics of the coal delivered hereunder; provided, however, that if Seller should at any time question the correctness of either the sampling or the analyses made by Buyer, Seller shall have the right to have the coal sampled and/or analyzed by a commercial testing laboratory, mutually chosen, and using mutually acceptable procedures, and the results thereof shall be accepted as the

quality and characteristics of the coal delivered hereunder in the period during which the sampling and/or analysis is thus performed by the commercial testing laboratory. If the average calorific value of six gross samples separately collected and analyzed by the commercial testing laboratory exceeds by 100 BTU the average of six gross samples separately collected and analyzed by the Buyer when both sets of samples have been taken from the same delivery of coal and if such BTU difference is proven to be statistically significant at a 5% probability level (meaning that the difference shall prove to be significant in 95 cases out of 100 in the long run), then Buyer shall pay the reasonable charges of such commercial testing laboratory, otherwise Seller shall pay such charges.

Section 4. Weighted Averages.

As soon as practicable after the end of each calendar half-month the weighted average "as received" calorific value of the coal delivered and accepted hereunder during that half-month shall be determined from the weights mentioned in Section 2 of this Article VI and from the sampling and analyses mentioned in Section 3 of this Article VI. The weighted average thus obtained shall be used in determining the amount to be paid to Seller for the coal delivered during such half-month.

Section 5. Force Majeure.

If because of force majeure either party hereto is unable to carry out any of its obligations under this Agreement, and if such party promptly gives to the other party hereto written notice of such force majeure, then the obligations of the party giving such notice shall be suspended to the extent made necessary by such force majeure and during its continuance, provided the effect of such force majeure is eliminated insofar as possible with all reasonable dispatch. Any deficiencies in deliveries of coal hereunder caused by force majeure shall not be made up except by mutual consent.

The term "force majeure" as used herein shall mean any causes beyond the control of the party affected thereby, such as acts of God, acts of the public enemy, insurrections, riots, strikes, labor disputes, labor or material shortages, fires, explosions, floods, breakdowns of or damage to plants, equipment or facilities (including emergency outages of equipment or facilities to make repairs to avoid breakdowns thereof or damage thereto), accidents of navigation, interruptions to transportation, river freezeups, embargoes, orders or acts of civil or military authority, or other causes of a similar nature not resulting from any default of the party affected thereby, which wholly or partly prevent the mining, delivering and/or loading of the coal by Seller, or the receiving, transporting and/or delivering of the coal by the carrier of the coal, or the accepting, utilizing and/or unloading of the coal by Buyer.

Section 6. Coal Reserves.

Seller represents that it now owns or controls in the said Grundy Knob area sufficient reserves of coal of the quality called for by this Agreement to enable Seller to supply from its said mine the total quantity of coal called for by this Agreement.

Seller covenants that it will not sell nor contract to sell to others coal from said reserves in such quantity as to jeopardize its ability to deliver the total quantity of coal called for by this Agreement. Nothing in this Section 6 shall be construed as preventing Seller from mining and selling coal from said reserves to others, provided the foregoing provisions with respect to said reserves are complied with.

Buyer shall have the right, but not the duty, to examine said coal reserves and the pertinent land records of Seller at all reasonable times to ascertain that Seller is complying with the foregoing provisions of this Section 6. If any such examination indicates that Seller is not complying with such provisions, an estimate of the coal reserves shall be made by a qualified expert, mutually chosen, whose findings shall be binding on the parties hereto. If such estimate discloses that Seller is not complying with said provisions then Seller shall, within ninety (90) days after written notice from Buyer so to do, take such action as may be required to enable it to comply with said provisions.

Section 7. Destination of Coal.

It is understood that the above-mentioned coal is primarily destined for delivery to and consumption in the Clifty Creek Plant. However, it may be advantageous to Buyer to have all or part of said coal delivered to other destinations. Therefore, the parties hereto hereby agree as follows:

(a) At any time and from time to time during the continuance of this Agreement, Buyer shall have the right, but not the duty, to have all or part of the above-mentioned coal consigned to OVEC for delivery to and consumption in its Kyger Creek Plant, provided Buyer gives Seller five days' written notice of such change in the destination of the coal and furnishes Seller with adequate instructions for consignment of the coal so to be delivered, and provided, also, that OVEC advises Seller in writing that it will accept and pay for such coal in accordance with the terms and conditions of this Agreement.

(b) At any time and from time to time during the continuance of this Agreement, Buyer shall have the right, but not the duty, to have all or part of the above-mentioned coal consigned to the United States Government or any agency thereof or to any one or more of the companies named below (which are herein and in the AEC Power Agreement

referred to as the "Sponsoring Companies"), provided Buyer gives Seller five days' written notice of such change or changes in the destination of the coal and furnishes Seller with adequate instructions for consignment of the coal so to be delivered, and provided, also, that the substitute consignee advises Seller in writing that it will accept and pay for such coal in accordance with the terms and conditions of this Agreement. Buyer's right as set forth in this subsection (b) shall relate only to such quantities of coal as (i) are not required for use in the Clifty Creek Plant and (ii) will not, in Seller's reasonable judgment, adversely affect Seller economically with respect to any other coal supply contracts existing or under negotiation between Seller and such substitute consignee or consignees.

In the event that, pursuant to the foregoing provisions of this subsection (b), Buyer notifies Seller of a change in the destination of a quantity of coal but Seller refuses to make such change on the ground that it will adversely affect Seller economically as aforesaid, then Buyer shall not be required to accept and pay for said quantity of coal to the extent that it cannot be utilized at the Clifty Creek Plant.

The names of the Sponsoring Companies are as follows:

Appalachian Power Company

The Cincinnati Gas & Electric Company

Columbus and Southern Ohio Electric Company

The Dayton Power and Light Company

Indiana & Michigan Electric Company

Kentucky Utilities Company

Louisville Gas and Electric Company

Monongahela Power Company

Ohio Edison Company

Ohio Power Company

Pennsylvania Power Company

The Potomac Edison Company

Southern Indiana Gas and Electric Company

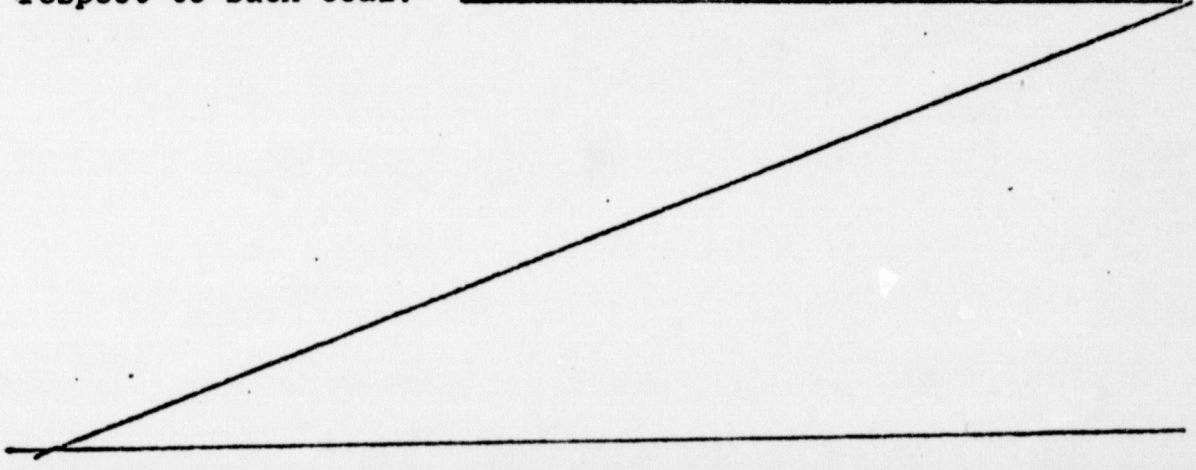
The Toledo Edison Company

West Penn Power Company

It is expressly understood that the Sponsoring Companies are named herein for the purpose of identification only and not to induce Seller to enter into this Agreement; and that none of the Sponsoring Companies will have any obligations under this Agreement unless and until, and only to the extent that, such Sponsoring Company advises Seller in writing that it will accept and pay for coal as hereinbefore in this subsection (b) provided.

(c) The references in this Agreement to Clifty Creek Plant and Buyer's plant shall mean the specified point of destination other than the Clifty Creek Plant when such other point of destination has been specified by Buyer in accordance with the provisions of this Section 7.

Anything in this Agreement to the contrary notwithstanding, it is understood and agreed that, when Buyer has given Seller notice as aforesaid of a change in the destination of any of the coal to be delivered hereunder, and when the substitute consignee named in such notice has advised Seller that it will accept and pay for such coal as aforesaid, then the coal delivered in accordance therewith shall be considered sold by Seller directly to such substitute consignee under and subject to all of the terms and conditions of this Agreement, as modified by this Section 7, as though such substitute consignee had been named as the Buyer herein in lieu of Indiana-Kentucky Electric Corporation, and Indiana-Kentucky Electric Corporation shall have no further obligation with respect to such coal.



Section 8. Records and Audits.

Seller and Buyer shall keep accurate records and books of account showing all costs, payments, price revisions, credits, debits, weights, analyses and all other data required of each of them for the purposes of this Agreement.

Each time the price is revised in accordance with Article V, and at any other reasonable time upon ten (10) days' written notice from Buyer, Seller shall furnish to Buyer a detailed statement showing Seller's calculations of the price which should then be in effect under the provisions of this Agreement.

Each of the parties hereto shall have the right at all reasonable times, upon written notice to the other, to require an audit of the appropriate records and books of account for the purpose of verifying the calculations of price revisions, the basis of such revisions, the amounts of costs, payments, credits, debits and all weights, analyses and other data required to be kept for the purposes of this Agreement. Such audit shall be made by a recognized firm of certified public accountants, mutually chosen, and the party requiring the audit shall pay the cost of the accountants' hire. The results of such audit shall be made known to the parties but the supporting data shall not be disclosed without the consent of the party whose records and/or books of account have been audited. If any such audit discloses

that any error has occurred and that, as a result thereof, an overpayment or an underpayment has been made, the amount thereof shall promptly be paid to the party to whom it is owed by the other party.

Each of the parties hereto shall have the right at all reasonable times, upon written notice to the other, to examine the records kept by the other of the weights and analyses of the coal delivered hereunder.

Section 9. Mining Facilities.

Seller represents and covenants that it will develop its said new mine with due diligence; that it will install and at all times have in and at said mine all adequate machinery, equipment and other facilities required to produce, prepare and deliver the quality and quantity of coal called for by this Agreement; that it will operate and maintain said machinery, equipment and other facilities in accordance with good mining methods and in such manner as to efficiently and economically produce, prepare and deliver such coal in accordance with its obligations hereunder. Buyer shall have the right, but not the duty, at all reasonable times to inspect said mine and the facilities appurtenant thereto and to observe the construction, development and operation thereof.

Section 10. Price Limitation.

Seller hereby covenants that if, at any time during the continuance of this Agreement, Seller contracts to sell to anyone coal having a quality equal to or better than the quality of the coal then being delivered hereunder and at a price lower than the price then being paid by Buyer for coal hereunder, but otherwise on substantially the same terms as specified herein, then and thereupon the price to be paid by Buyer for coal delivered hereunder shall be reduced to such lower price so long as such lower price remains in effect.

If and whenever Seller contracts to sell coal to anyone at a price lower than the price then being paid by Buyer for coal hereunder, but otherwise on substantially the same terms as specified herein, Seller shall promptly advise Buyer in writing of the price and quality of the coal called for by such contract.

Section 11. Employee Interest.

Seller represents to Buyer that Seller has not given and will not give, directly or indirectly, anything of value to any employee or other representative of Buyer or of OVEC or of any of the Sponsoring Companies named in Section 7 of this Article VI with the view to securing this Agreement or obtaining favorable treatment with respect to the performance of this Agreement. If such representation is untrue, Buyer

shall have the right to declare this Agreement null and void or to terminate it, to sue for damages and to take such other action as may be provided by law. If Seller obtains knowledge at any time that any such employee has a direct or indirect interest in Seller or its affiliates, it will immediately inform Buyer of such fact.

Section 12. Arbitration.

Except as to any matter expressly stated herein to be within the sole judgment of one of the parties hereto, any dispute, controversy or claim arising out of or relating to this Agreement shall be determined by arbitration in accordance with the rules then obtaining of the American Arbitration Association; provided that neither party shall initiate arbitration proceedings until the expiration of thirty (30) days after notice of such dispute, controversy or claim shall have been given to the other party. Judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

Section 13. Notices.

All notices under this Agreement shall be in writing; and if to Buyer, shall be sufficient in all respects if delivered in person to its President or Vice President or sent by registered mail addressed to Buyer at P. O. Box 468, Piketon, Ohio, or at any subsequent address of which Buyer

may notify Seller in writing; and if to Seller, shall be sufficient in all respects if delivered in person to its President or Vice President or sent by registered mail addressed to Seller at its office at the Bulkley Building, 1501 Euclid Avenue, Cleveland, Ohio, 44115, or at any subsequent address of which Seller may notify Buyer in writing.

Section 14. Waivers and Remedies.

The failure of either party to insist in any one or more instances upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights, but the same shall continue and remain in full force and effect.

All remedies afforded under this Agreement shall be taken and construed as cumulative and in addition to every other remedy provided for herein or by law.

No default by either party to this Agreement in the performance of any of its covenants or obligations hereunder, which except for this provision would be the legal basis for rescission or termination of this Agreement by the other party hereto, shall give or result in such a right unless and until the party committing such default shall fail to correct the default within thirty (30) days after written notice of claim of such default is given to such defaulting party by the other party hereto.

Section 15. Successors and Assigns.

This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns; but this Agreement may not be assigned by either party without the written consent of the other, except that either party may without the consent of the other assign this Agreement to a successor to all or substantially all of its property and assets and may pledge this Agreement to secure its indebtedness incurred or to be incurred for the purpose of or in connection with the performance of this Agreement, and this Agreement may be assigned or transferred by either party without the consent of the other to one or more persons, firms or corporations who shall assume the obligations of the pledging party hereunder in connection with the enforcement of any such pledge, and either party hereto may without the consent of the other assign to any financing institution or institutions any moneys due or to become due hereunder. Buyer may without the consent of Seller, assign this Agreement in whole or in part to OVEC or to one or more of the Sponsoring Companies; and, upon such assignee or assignees expressly assuming in writing, to the extent of such assignment, the obligations of the Buyer hereunder, and if each such assignee has a net worth equal to that of Buyer, Seller shall, to the extent of such assignment, release Buyer from all further obligations under this Agreement. Written consent to one or more assignments shall not be construed as waiving the necessity of obtaining written consent to other and/or additional assignments.

Section 16. Integration.

This Agreement contains the entire agreement between Buyer and Seller, and no alteration or modification thereof shall be binding unless in writing and signed by Buyer and Seller.

Section 17. Interpretation.

The terms and provisions of this Agreement shall be interpreted and construed in accordance with the laws of the State of Indiana. The titles of the Articles and Sections in this Agreement have been inserted as a matter of convenience of reference only and shall not control or affect the meaning or construction of any of the terms and provisions hereof.

Section 18. Provisions of AEC Power Agreement.

Buyer represents that the AEC Power Agreement contains the following provisions wherein OVEC is referred to as "Corporation", to-wit:

"Section 7.04 Accounts.

"4. Corporation further agrees to include in all its subcontracts hereunder a provision to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor involving transactions related to the subcontract. The term 'subcontract' as used in this Section 7.04 means any purchase order or agreement to perform all or any part of the work or to make or furnish any materials required for the performance of this contract, but does not include (i) purchase orders not exceeding $1,000, (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public, or (iii) subcontracts or purchase orders for general inventory items not specifically identifiable with the work under this contract.

"Section 7.13 Nondiscrimination in Employment.

"During the performance of this contract, Corporation agrees as follows:

"1. Corporation will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. Corporation will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Corporation agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"2. Corporation will, in all solicitations or advertisements for employees placed by or on behalf of Corporation, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

"3. Corporation will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding a notice, to be provided by the agency contracting officer, advising the said labor union or workers' representative of Corporation's commitments under Section 202 of Executive Order No. 11,246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"4. Corporation will comply with all provisions of Executive Order No. 11,246 of September 24, 1965, and of the rules, regulations and relevant orders of the Secretary of Labor.

"5. Corporation will furnish all information and reports required by Executive Order No. 11,246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"6. In the event of Corporation's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations or orders, this Agreement may be canceled, terminated, or suspended in whole or in part and Corporation may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11,246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in the Executive Order No. 11,246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"7. Corporation will include the provisions of Paragraphs 1 through 7 in every subcontract or purchase order entered into after the date of Modification No. 3 to this Agreement unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11,246 of September 24, 1965, as amended, so that such provisions will be binding upon each subcontractor or vendor. Corporation will take such action with respect to any such subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, that in the event Corporation becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, Corporation may request the United States to enter into such litigation to protect the interests of the United States.

"Section 7.15. Contract Work Hours Standard Act - Overtime Compensation.

"This contract, to the extent that it is of a character specified in the Contract Work Hours Standards Act (40 U.S.C. 327-330), is subject to the following provisions and to all other applicable provisions and exceptions of such Act and the regulations of the Secretary of Labor thereunder.

"1. Neither the Corporation nor any subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic in any workweek in which he is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek on work subject to the provisions of the Contract Work Hours Standards Act unless such laborer or mechanic receives compensation at a rate not less than one and one-half times his basic rate of pay for all such hours worked in excess of eight hours in any calendar day or in excess of forty hours in such work-week, whichever is the greater number of overtime hours.

"2. In the event of any violation of the provisions of Paragraph 1, the Corporation and any subcontractor responsible therefor shall be liable to any affected employee for his unpaid wages. In addition, the Corporation and such subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provisions of Paragraph 1 in the sum of $10 for each calendar day on which such employee was required or permitted to be employed on such work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by Paragraph 1.

"3. Except as otherwise provided in Section 7.12 of this Agreement, AEC may withhold from the Corporation, from any moneys payable on account of work performed by the Corporation or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of the Corporation or subcontractor for unpaid wages and liquidated damages as provided in the provisions of Paragraph 2.

"4. The Corporation shall insert Paragraphs 1 through 4 of this Section 7.15 in all subcontracts, and shall require their inclusion in all subcontracts of any tier, entered into after the effective date of Modification No. 3 to this Agreement."

This Agreement shall be deemed to contain all of the provisions required by Paragraph 4 of Section 7.04, Paragraph 7 of Section 7.13 and Paragraph 4 of Section 7.15 of the AEC Power Agreement to be included in OVEC's subcontracts; and Seller shall comply with such provisions to the extent that they are applicable to Seller in its performance of this Agreement. Nothing contained in this Agreement shall be deemed to constitute a determination by either Buyer or Seller that this Agreement constitutes a subcontract or purchase order

or that Seller is a subcontractor or vendor within the meaning of Section 7.04, Section 7.13 or Section 7.15 of the AEC Power Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective corporate officers thereunto duly authorized, as of the day and year first above written.

INDIANA-KENTUCKY ELECTRIC CORPORATION

By PHILIP SPORN [SEAL]
President

Attest:

W.J. ROSE
Assistant Secretary

ISLAND CREEK COAL SALES COMPANY

By J. L. HAMILTON
Chairman of the Board

Attest:

[illegible] B. LEWIS
Secretary

Exhibit "A" - Coal Supply Agreement dated December 19, 1966 - Annexed to Complaint

ANNEX A

The composite index to be used for purposes of computing supply cost escalation under Section 2(d)(ii) of Article V shall consist of the following components of the Index of Wholesale Prices published by the U.S. Department of Labor, Bureau of Labor Statistics, weighted as follows:

Code No.	Commodity	Weight
0575	Lubricating Oil Materials	5.4
0672	Explosives	7.6
081	Lumber	6.4
1081-01.03	Machine Bolts	16.5
1152	Mining Machinery and Equipment	64.1
		100.0%

The level of such composite index for June 1968 shall be the sum of the products of each final index number (when published for the month of June 1968) for each component of the composite index multiplied by the weight assigned to each such component. Subsequent recomputations of the index number for such composite index shall be accomplished in the same fashion.

Final indices for the month of June or December, as the case may be, shall be used in each such semiannual recomputation, and the Base Price shall be retroactively adjusted to the beginning of the new semiannual period.

* * *

Exhibit "A" - Coal Supply Agreement dated December 19, 1966 - Annexed to Complaint

10 a-48

ISLAND CREEK COAL SALES COMPANY

A. L. LYNN
PRESIDENT

December 13, 1966

1651 EUCLID AVENUE
CLEVELAND, OHIO 44115

Indiana-Kentucky Electric Corporation
P. O. Box 468
Ghent, Ohio

Dear Sirs:

This is to record our understanding, in connection with the Coal Supply Agreement between us entered into on this date, that such Agreement will be supplemented with premium/penalty provisions along the following lines, if you so desire, as soon as the necessary cost analyses are completed:

(1) The premium/penalty provisions shall relate to moisture, ash and sulfur content, as received, of the coal delivered to you pursuant to the Agreement.

(2) Such provisions shall apply to variations from the norms specified in Article IV, Section 3, of the Agreement which are within the rejection limits specified in Article IV, Section 4, of the Agreement, to the extent that such variations exceed tolerances to be agreed upon.

(3) The penalty provisions for excess moisture, ash or sulfur content shall not exceed the anticipated increase in plant operating costs which would result from such excess amounts, as determined by cost analyses now underway, and shall be matched by equal premium provisons for moisture, ash or sulfur content lower than permitted by the norms specified in Article IV, Section 3, of the Agreement.

If the foregoing is in accordance with your understanding of our Agreement, please sign and return the enclosed copy of this letter.

Sincerely yours,

ISLAND CREEK COAL SALES COMPANY

A. L. Lynn
President

ACCEPTED:
INDIANA KENTUCKY ELECTRIC CORP.

By_____

Exhibit "B" - Letter dated July 20, 1970 from Stonie Barker, Jr. to R.D. Dunlevy - Annexed to Complaint

10 a-49

ISLAND CREEK COAL SALES COMPANY

EXECUTIVE OFFICES

1501 EUCLID AVENUE
CLEVELAND, OHIO 44115

July 20, 1972

Mr. R. D. Dunlevy, Vice President
Indiana-Kentucky Electric Corporation
Two Broadway
New York, N. Y. 10004

Dear Mr. Dunlevy:

We are surprised indeed that we have not heard from you in response to our letters of June 29, 1972, and July 7, 1972.

We have given careful consideration to the proposals you made in your letter of June 20, 1972, and we find the corrective steps which you suggested will not, without unreasonable expense, make it possible or practical for Island Creek to continue to produce coal for delivery under its contract. We are thus left with no alternative but to give you notice, which we hereby do, terminating our Agreement of December 19, 1966, as amended, pursuant to Article IV, Section 6 thereof and other applicable provisions and law.

Sincerely,

Stonie Barker, Jr.

Stonie Barker, Jr.
Chairman

Registered mail - Return receipt.

DEFENDANTS' NOTICE OF MOTION
TO DISMISS COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

S I R S :

PLEASE TAKE NOTICE that upon the Affidavit of John Lansdale, sworn to March 26, 1973 and upon the pleadings and all the prior proceedings herein, defendant will move this Court, before the Honorable Arnold Bauman, at the United States Courthouse, Foley Square, New York, New York, on the 7th day of May, 1973, at 9:30 in the forenoon of that day or as soon thereafter as counsel can be heard, pursuant to Rules 12(b)(6) and 56(b) to dismiss the Complaint herein and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
April 25, 1973

CAHILL, GORDON, SONNETT,
REINDEL & OHL

By s/Raymond L. Falls, Jr.
A Member of the Firm
Attorneys for Defendant
Indiana-Kentucky Electric
Corporation
Office & P.O. Address:
80 Pine Street
New York, New York 10005

TO:
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
477 Madison Avenue
New York, New York 10022

AFFIDAVIT OF JOHN LANSDALE, ESQ.
SWORN TO MARCH 26, 1973
IN SUPPORT OF MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

I, John Lansdale, being duly sworn, depose and say:

(1) That I am an attorney of record representing defendant in this action;

(2) That the attached letter is a true copy of a submission I made to the Cleveland Regional Office of the American Arbitration Association on January 25, 1973;

(3) That also attached is a true copy of a joint submission to arbitration dated June 10, 1971 executed by Indiana - Kentucky Electric Corporation and Island Creek Coal Sales Company.

s/ John Lansdale

[Duly sworn to
March 26, 1973]

Exhibit "A" - Defendant's Submission to Arbitration - Annexed to Affidavit of John Lansdale

January 25, 1973

Cleveland Regional Office
American Arbitration Association
215 Euclid Avenue
Cleveland, Ohio 44114

Re: Indiana-Kentucky Electric Corporation v. Island Creek Coal Company and Island Creek Coal Sales Company

Gentlemen:

Since the foregoing arbitration was initiated, Island Creek Coal Sales Company (Seller) has terminated the contract with respect to which this arbitration was initiated, purporting to act under the provisions of Section 6 of Article IV of said contract. This provision recognizes the possibility that legislative or regulatory bodies may impose regulations or restrictions relating to mining practices which will make it impossible or impractical for Seller to continue to produce coal for delivery under the contract and provides that if any such regulations or restrictions are imposed and "if a [sic] result thereof Seller in its sole judgment decides that it will be impossible or impractical for Seller to continue to produce coal for delivery hereunder," Seller shall have the right to terminate the contract without further obligation unless Buyer shall prevent the termination by agreeing to reimburse the Seller for the expense deemed by Seller to be in its sole judgment unreasonable.

It is the position of the Buyer, Indiana-Kentucky Electric Corporation, that the determination of Seller that it would be impossible or impractical to continue to produce coal for delivery under the contract was not made as a result of the imposition of regulations or restrictions referred to in Section 6 of Article IV of said contract and Indiana-Kentucky Electric Corporation desires to submit for arbitration and question whether such determination was made as a result of the imposition of regulations of the type referred to in Section 6 of Article IV of the contract.

Very truly yours,

/s/ John Lansdale

Exhibit "B" - Joint Submission to Arbitration - Annexed to Affidavit of John Lansdale

AMERICAN ARBITRATION ASSOCIATION

SUBMISSION TO ARBITRATION

Dated: June 10, 1971

The named Parties hereby submit the following disputes to arbitration under the Commercial Arbitration Rules of the American Arbitration Association:

Indiana-Kentucky Electric Corporation (hereinafter referred to as IKEC) claims that Island Creek Coal Sales Company and Island Creek Coal Company (hereinafter collectively referred to as Island Creek) should be required to deliver not less than 2,125,000 nor more than 2,500,000 tons of coal to IKEC during the year 1971 in accordance with a written contract and guarantee dated December 19, 1966, copies of which are attached hereto and marked collectively as Exhibit A.

In addition, IKEC claims damages in an amount which cannot presently be determined for Island Creek's failure to deliver approximately 400,000 tons of coal under the provisions of said contract and guarantee during the year 1970, and approximately 1,000,000 tons of coal during the year 1971.

Island Creek denies that it was or is obligated to produce and deliver to IKEC the aforementioned quantity of coal to IKEC. It contends that the Federal Mine Health

and Safety Act of 1969 has made it impossible or impractical for Island Creek to produce at its Hamilton No. 1 Mine and deliver to IKEC the total quantity of coal stated in the contract for the years 1970 and 1971 and that it has been forced to prorate its production from that mine among its long-term contract customers of that mine.

Island Creek also contends that it is entitled to terminate its contract with IKEC under the provisions of Article IV, Section 6. To the extent that termination under Article IV, Section 6 is not available from the first day on account of which IKEC claims damages, Island Creek asserts its right to be excused from performance under the force majeure clause of the contract and under Article 2-615 of the Uniform Commercial Code.

Further, Island Creek asserts that a hardship has occurred whereby Island Creek is prevented from developing the Hamilton No. 1 Mine as planned because of matters beyond its control, namely, government regulations and legislative action, that IKEC has refused to recognize the same, and that therefore the contract should either be equitably adjusted by amendment or terminated.

Remedy Sought by IKEC: Specific Performance and Damages

Remedy Sought by Island Creek: Termination

Exhibit "B" - Joint Submission to Arbitration - Annexed to Affidavit of John Lansdale

Amount of Money Involved:	Indeterminate
Number of Arbitrators Desired:	Three, who shall be attorneys experienced in commercial transactions
Place of Hearing:	Cleveland, Ohio

The foregoing contract, Article VI, Section 12, provided as follows:

> "Except as to any matter expressly stated herein to be within the sole judgment of one of the parties hereto, any dispute, controversy or claim arising out of or relating to this Agreement shall be determined by arbitration in accordance with the rules then obtaining of the American Arbitration Association; provided that neither party shall initiate arbitration proceedings until the expiration of thirty (30) days after notice of such dispute, controversy or claim shall have been given to the other party. Judgment upon the award rendered, may be entered in any court, state or federal, having jurisdiction."

The parties agree that all notices required by the aforementioned provision have been duly given.

We further agree that we will abide by and perform any decision rendered hereunder and that a judgment

may be entered upon the award in any court, state or federal, having jurisdiction.

INDIANA-KENTUCKY ELECTRIC CORPORATION
New York, New York

Squire, Sanders & Dempsey

By s/John Lansdale

s/Robert C. Maynard

1800 Union Commerce Building
Cleveland, Ohio 44115

Attorneys for Indiana-Kentucky Electric Corporation

ISLAND CREEK COAL SALES COMPANY
ISLAND CREEK COAL COMPANY
Cleveland, Ohio

Buchanan, Ingersoll, Rodewald, Kyle & Buerger

By s/James G. Park

1800 Oliver Building
Pittsburgh, Pennsylvania 15222

Attorneys for Island Creek Coal Sales Company and Island Creek Coal Company

AFFIDAVIT OF JAMES G. PARK, ESQUIRE
SWORN TO MAY 16, 1973
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

COMMONWEALTH OF PENNSYLVANIA)
) SS:
COUNTY OF ALLEGHENY)

I, James G. Park, being duly sworn according to law, depose and say:

1. That I am an attorney of record representing the plaintiff in this action and submit this Affidavit in opposition to defendant's Motion to Dismiss this action;

2. That I, in conjunction with counsel for the defendant, prepared the Submission to Arbitration to the American Arbitration Association dated June 10, 1971, executed by the plaintiff and the defendant in this action;

3. That the said Submission was made pursuant to Article VI, Section 12 of the Agreement dated December 19, 1966, between plaintiff and defendant and was not intended as a new agreement to arbitrate;

4. That the controversy submitted to arbitration by the said Submission did not include an agreement by the plaintiff to arbitrate matters within the plaintiff's sole

judgment; that the parties did not even discuss the arbitrability of matters under Article IV, Section 6 in connection with the preparation of the said Submission, and that at the date of the said Submission the plaintiff had not served notice terminating the said Agreement pursuant to the provisions of Article IV, Section 6 thereof;

5. That in the said Submission the plaintiff claimed the right to terminate the said Agreement under Section 2-615 of the Uniform Commercial Code and under the hardship portion of the said Submission;

6. That the inclusion of reference to Article IV, Section 6 was intended by the plaintiff to indicate to the arbitrators that in said Agreement the defendant had been allocated the risk of governmental regulation; and

7. That on December 14, 1971, I attended a meeting between representatives of plaintiff and defendant. At that meeting, defendant was handed a memorandum, a copy of which is annexed hereto as Exhibit A, setting forth the corrective steps which plaintiff considered were necessary for plaintiff to continue to produce and deliver to defendant the quantity and quality of coal specified in the Agreement without violating the 1969 Federal Coal Mine

AFFIDAVIT OF JAMES G. PARK, ESQUIRE
SWORN TO MAY 16, 1973 - IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS

Health and Safety Act and the regulations thereunder. At no time during this meeting did defendant state that plaintiff's rights under Article IV, Section 6 were included in the Submission of June 10, 1971. The first time to my knowledge that such a contention was made was at a hearing before the arbitrators on December 11, 1972, almost a year later.

s/ James G. Park

[Duly sworn to
May 16, 1973]

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966

During the early hours of November 20, 1968, an explosion in Consolidation Coal Company's No. 9 Mine near Farmington, West Virginia killed 79 miners. Public and union pressure was exerted on the Federal Government for drastically increased safety standards. As a direct result, on December 30, 1969 the Federal Coal Mine Health and Safety Act of 1969 (hereinafter referred to as the "Safety Act") was enacted.

The Safety Act has had and will continue to have a severe impact on the coal industry, upon Island Creek's operations in general and upon the operation of the Hamilton No. 1 Mine in particular. This comprehensive legislation and the regulations thereunder have imposed numerous new duties on mine operators. To perform these new duties, Island Creek has been compelled to make substantial changes in its mining practices. The result has not only been to raise the costs of mining but also drastically to lower productivity and hence the quantity of coal produced, as well as the quality. Thus, it is impossible or impractical for Island Creek to produce from the Hamilton No. 1 Mine the quantity and quality of coal specified under its Agreement with IKEC.

Island Creek has made a determination of possible corrective steps, and the expense of such, to make it possible for Island Creek to continue to produce the specified quantity and quality of coal for delivery under its Agreement with IKEC without violating the Safety Act and the regulations thereunder.

Island Creek has considered two alternatives. First, it determined that in order to increase production at the Hamilton No. 1 Mine to approximately 5,000,000 tons per year, it will be necessary to increase from the present 12 units of mining equipment working 16 sectional shifts per day utilizing 446 men to 23 units of mining equipment working 43 sectional shifts per day utilizing 955 men. This enormous increase in working units and manpower requires a capital investment of approximately $4,405,000 in production and face equipment, $1,599,000 in haulage and safety equipment, $558,000 in rock handling equipment, $664,000 in additional power equipment, $2,184,000 in additional belt conveyors and feeders and $269,000 in miscellaneous equipment. In addition to the aforesaid and before any of the additional equipment can be installed or additional miners assigned, two new airshafts and two new portals must be constructed at an estimated cost of about $3,520,000. Exhibits showing these capital and labor costs are attached.

While the increase to 43 sectional shifts per day would cost in capital equipment over $12,000,000, the labor cost and overhead per ton alone would be in excess of the contract price of the coal. But, in addition to the unreasonableness of the excess cost, the Hamilton No. 1 Mine cannot physically support 43 sectional shifts per day. Accordingly, Island Creek deems the increase to 43 sectional shifts all working out of the Hamilton No. 1 Mine to produce 5,000,000 tons of coal per year as physically impossible and requiring unreasonable expense.

physically possible to design and build another mine within the Hamilton No. 1 reserves and develop it to produce 1,800,000 tons of coal per year, while at the same time increasing the production of Hamilton No. 1 to 3,200,000 tons per year. Island Creek estimates the capital costs of the new Hamilton No. 1-A would be approximately $15,500,000 and the additional capital expenditures necessary to increase production of Hamilton No. 1 to 3,200,000 tons per year would cost approximately $2,000,000, which costs Island Creek deems to be unreasonable expense. In addition to the capital costs, Island Creek would also incur substantial additional labor and overhead costs. Exhibits showing these capital and labor costs at Hamilton No. 1-A Mine are attached.

Island Creek estimates that in order to comply with the Safety Act and its regulations as now promulgated, Island Creek would have to incur over $17,500,000 for capital expenditures plus many millions in increased labor costs with no hope of being able to recoup its investments. The foregoing does not take into account any further restrictions on mining practices which may be forthcoming, nor does it consider the time which would be involved in procuring the equipment and men and the construction of the airshafts and portals.

The Hamilton No. 1 Mine is now operating at a loss because of the Safety Act. Island Creek knows of no other corrective steps

production other than as set forth herein. Island Creek has determined that such steps will not make it possible for Island Creek to continue to produce coal for delivery to IKEC without unreasonable expense to Island Creek as hereinbefore described.

December 14, 1971

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

PROPOSAL FOR

AN ADDITIONAL MINE

IN THE

HAMILTON NO. 1 RESERVES

HAMILTON NO. 1A MINE

NO. 9 SEAM

UNION COUNTY, KENTUCKY

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

HAMILTON NO. 1A MINE
MINE SUMMARY

26 a

LOCATION	2 Miles South Of Wabash Island, Union County, Kentucky
TRANSPORTATION	Barge, Ohio River Mile 851.7
CLEAN COAL RECOVERABLE TONS	22,518,474
DAILY TONS	7,700
ANNUAL TONS	1,848,000
MINE LIFE - YEARS	12.2
DEVELOPMENT TONS	1,144,000
WORK SCHEDULE	
Engineering & Site Preparation	2 Months
Shafts & Surface Facilities	22 Months
Bottom Arrangement & Set-Up	2 Months
Development Period	15 Months
Total	41 Months
COAL QUALITY SUGGESTED GUARANTEE	
Moisture	9.7%
Dry Ash	16.8%
Dry Sulphur	3.6%
A.R. BTU	10,930
Size	3" - 1-1/4" x 0"
Cleaning Rejects	7.5%

	Overland Belt Conveyor	Overland Truck
TOTAL CAPITAL COST	$15,605,000	$15,581,000
CAPITAL COST PER ANNUAL TON	$8.67	$8.66
DEVELOPMENT COST	$5,771,954	$5,854,322
TOTAL EMPLOYEES	381	392

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

HAMILTON NO. 1A MINE
MINE SUMMARY - CONTINUED

	Overland Belt Conveyor	Overland Truck
DAILY TONS PER PAYROLL MAN	20.2	19.6
ESTIMATED MINE COST		
Mine Cost	$4.135	$4.204
Mine General Expense	$0.910	$0.913
Royalty Expense	$0.055	$0.055
Total	$5.100	$5.172

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

INTRODUCTION

Purpose

The purpose of this report is to present a feasibility study of constructing another mine in the No. 9 seam in the northern portion of the Hamilton No. 1 coal reserves. The mine will be called herein the Hamilton No. 1A Mine and will be added as a supplementary source of production for the Hamilton No. 1 Mine. This report will present all of the available data on property, reserves, drilling, quality, general mining plan, capital expenditures, mine production, and mine costs.

Property Location

The property is located in Union County, Kentucky on the Ohio River immediately downstream from Wabash Island.

The reserves assigned to this proposed mine are a portion of those currently assigned to the Hamilton No. 1 Mine. Hamilton No. 1A reserves are bounded on the north by the Ohio River, on the west by faults at the Ohio River, on the east by faults, and on the south by reserves assigned to the Hamilton No. 1 Mine.

Drilling

A total of 10 core holes to the No. 9 seam have been drilled by the West Kentucky Coal Company and the Island Creek Coal Company. These have been used to determine the seam height and extent of the reserves. Table I of this report lists all of these holes and shows an average seam height of 60.5 inches.

Reserves

The reserves of No. 9 seam coal assigned to this mine contain a total of 5,962 acres. The reserves are calculated on the basis of 150 tons per acre inch of coal, a recovery rate of 45 per cent, a seam thickness of 60.5 inches, and cleaning rejects of 7.5 per cent, which yields 3,777 tons per acre of clean coal.

These reserves are presented in the following table:

Status	Acres	Per Cent	Clean Tons Recoverable
Owned	77	1.3	290,629
Leased	5,527	92.7	20,875,479
Adverse	358	6.0	1,352,166
Total	5,962	100.0	22,518,474

Mining Conditions

Since the No. 9 seam of coal assigned to this mine joins the present Hamilton No. 1 Mine on the north side, it is expected that mining conditions will closely approximate those in the north side of the Hamilton No. 1 Mine. The coal lies from 600 to 800 feet in depth which should cause no unusual effects on mining. Roof conditions are expected to be good at the face and successfully held by roof bolting. However, all main haulage ways, belt entries, and air courses will have to be supported with timbers, cross bars, and posts to assure that they will remain open.

Shaft & Portal Facilities

The production opening of this mine will be a 20-foot diameter shaft with two automatically-operated skips. The depth of the No. 9 coal seam at the proposed shaft location is about 740 feet, and the shaft will extend about 160 feet below the coal seam to install skip loading facilities. An emergency elevator will be located in this shaft.

A 22-foot diameter supply and man shaft will be constructed. This shaft will be used for lowering all the materials and supplies in the mine, and for the normal access means of personnel. It shall be large enough to lower all except the largest mining machines in one piece. It will be automatically operated, except for lowering larger pieces of equipment and supplies.

A third shaft 30 feet in diameter will be constructed for the exhaust ventilation system. A high capacity and high pressure fan will be installed over it to exhaust air from the mine. The other two shafts will be used as intakes for the ventilation system.

Outside Coal Handling Facilities

Coal will be delivered from the coal hoisting shaft to a head frame equipped with skip dumping arrangements. The coal will be delivered through a surge bin to a belt conveyor which will feed a 10,000-ton coal storage silo. From the silo coal will be loaded onto a belt conveyor for transporting overland to the 3,000-ton raw coal silo at the Hamilton No. 1 Mine. From this point the coal will be blended with that from the Hamilton No. 1 Mine and washed in the Hamilton No. 1 facilities, then transported to the river loading facilities.

An alternate method of truck-hauling the coal from the Hamilton No. 1A Mine to the Hamilton No. 1 Mine has been included in the capital requirements for this mine.

General Outside Facilities

There will be a bathhouse constructed which will be large enough to have change and bathing facilities, lamp room, and office space. There will be no supply house constructed at this site due to its closeness to the Hamilton No. 1 warehouse.

There will be an outside storage yard for supplies with mine track connecting it to the supply shaft. A storage building for placing items out of the weather, a powder magazine, a cap magazine, storage sheds, supply racks, and bulk rock dust system will be constructed.

Underground Mining Plan

The Hamilton No.1A Mine will have seven production units of conventional equipment working two shifts per day. The equipment will be of the high capacity

type, with coal haulage to be on rope frame belt conveyors.

Quality Analysis

The quality of the No. 9 seam assigned to this mine is expected to be the same as that presently being produced from the Hamilton No. 1 Mine. Due to added dilution of foreign materials caused by the compliance with the Federal Coal Mine Health & Safety Act of 1969, and the increased moisture added by spraying to allay the dust, it is expected that the average quality analysis will not exceed the following:

Moisture	Ash, Dry	Sulfur, Dry	Btu, As Rec'd.
9.7%	16.8%	3.6%	10,930

Schedule Of Development & Production

An estimate of the time to place this mine in full production has been prepared. It is estimated that all of the outside facilities and structures can be completed by the time the operating shafts are completed. Time has been included for engineering, site preparation, shaft construction, surface facilities construction, and the development period to bring the mine to full production.

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

SUMMARY
CAPITAL EXPENDITURE REQUIREMENTS
HAMILTON NO. 1A MINE

	Overland Belt Conveyor	Overland Truck
Land Acquisition	$ 125,000	$ 125,000
Engineering	150,000	150,000
Temporary Construction Facilities & Site Preparation	164,000	164,000
Power Supply Outside	125,000	125,000
Miscellaneous Surface Structures	303,000	303,000
Hoist Shaft - 20-Ft. Diameter	1,353,000	1,353,000
Hoisting Shaft Equipment	1,337,000	1,337,000
Supply Shaft - 22-Ft. Diameter	1,133,000	1,133,000
Supply Shaft Equipment	763,000	763,000
Exhaust Airshaft - 20-Ft. Diameter	713,000	713,000
Mine Ventilating Fan	85,000	85,000
Coal Handling & Storage Facilities	504,000	504,000
Overland Belt Conveyor System	2,027,000	- -
Overland Truck Haulage System	- -	2,003,000
Production & Roof Bolting Equipment	2,972,000	2,972,000
Haulage & Safety Equipment	1,141,000	1,141,000
Rock & Grading Equipment	338,000	338,000
Belt Conveyors & Terminal Groups	1,661,000	1,661,000
Power Supply Inside	711,000	711,000
Total	$15,605,000	$15,581,000
Tons Per Year	1,848,000	1,848,000
Development Tons	1,144,000	1,144,000
Development Cost		
Mine General Expense ($0.910/Ton)	$ 1,041,040	- -
($0.913/Ton)	- -	$ 1,044,472
Labor Cost ($2.392/Ton)	2,736,448	- -
($2.451/Ton)	- -	2,803,944
Supplies & Outside Services ($1.743/Ton)	1,993,992	- -
($1.753/Ton)	- -	2,005,432
Extra Work		
Overcasts	50,000	50,000
Install Track & Belt Drives	40,000	40,000
Install Unit Electrics	4,000	4,000
Timbering	175,000	175,000
Initial Driveage	85,000	85,000
Purchase Stock Items	120,000	120,000
	$ 5,771,954	$ 5,854,322

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

ESTIMATE OF
HAMILTON NO. 1 MINE
CAPITAL EXPENDITURE REQUIREMENTS

33 a

LAND ACQUISITION	
Plant site, crop damage, fencing, etc.	$ 125,000
ENGINEERING	
Detail layouts and specifications for shafts, associated facilities, outside facilities, and division engineering	$ 150,000
TEMPORARY CONSTRUCTION FACILITIES AND SITE PREPARATION	
Road construction	$ 40,000
Surface drains	20,000
Site preparation	60,000
Construction power expense	44,000
	$ 164,000
POWER SUPPLY OUTSIDE	$ 125,000
MISCELLANEOUS SURFACE STRUCTURES	
Bathhouse, supply room, and office	100,000
Bulk rock dust silo-feeder and borehole	25,000
Roof bolt storage shed	6,000
Oil and grease tanks and borehole	9,000
Powder and cap magazines	15,000
Heavy equipment shed	15,000
Racks for mine yard supplies	3,000
Supply yard surfacing	15,000
Supply yard tracks	25,000
Fire protection system	15,000
Fresh water lake	75,000
	$ 303,000
HOISTING SHAFT - 20-FOOT DIAMETER	
Contractor set-up cost	$ 80,000
Collaring 20-ft. diameter x 40-ft. deep	85,000
Sinking and panning - 700 ft.	245,000
Six-inch concrete lining - 700 ft.	289,000
Shaft bottom excavation	165,000
Shaft bottom concrete	220,000
Steel buntons and wire mesh	50,000
Rigid buntons below coal seam	50,000
Rock car dump and floor steel	60,000
Stairways and walks below coal seam	23,000
Tensioning beams and stops	6,000
Bottom steel arches	40,000
Guniting	16,000
Piping, pump, and sump	24,000
	$ 1,353,000

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

DETAILS OF
HAMILTON NO. 1A MINE
CAPITAL EXPENDITURE REQUIREMENTS
(Continued)

HOISTING SHAFT EQUIPMENT	
Head frame, rigid guides, and dumping station	$ 232,000
Two sets 8-ft. diameter sheaves -	35,000
Headframe concrete foundations, erection, and installation	70,000
Skips and dump mechanism	50,000
Hoist, guide, and balance ropes	52,000
Installation of ropes and skips	40,000
Emergency elevator, including installation	150,000
Skip loading hoppers and feeders including installation	183,000
Spare motors, electrical components, and misc. equipment	100,000
Hoist, controls, electrics, etc.	270,000
Hoist installation	60,000
Hoist foundations and building	95,000
	$ 1,337,000
SUPPLY SHAFT - 22-FT. DIAMETER	
Contractor set-up cost	$ 60,000
Collaring 22-ft. diameter x 40 ft. deep	103,000
Sinking and panning	296,000
Six-inch concrete lining	351,000
Shaft bottom excavation	45,000
Shaft bottom concrete	113,000
Special buntons top and bottom	25,000
Steel buntons and guides	114,000
Piping, pump, and sump	24,000
Tensioning beams and stops	2,000
	$ 1,133,000
SUPPLY SHAFT EQUIPMENT	
Headframe complete	$ 116,000
Two sets 8-ft. diameter sheaves	35,000
Headframe foundations, piers, etc.	36,000
Cage, counterweight, with rope attachments	50,000
Hoist ropes	31,000
Rope and cage installation	30,000
Hoist, controls, electrics, etc.	265,000
Hoist installation	50,000
Hoist house and foundations	75,000
Spare motors, electrical components, and misc. equipment	75,000
	$ 763,000

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DETAILS OF
HAMILTON NO. 1A MINE
CAPITAL EXPENDITURE REQUIREMENTS
(Continued)

EXHAUST AIRSHAFT - 20-FT. DIAMETER	
Contractor set-up cost	$ 60,000
Collaring 20-ft. diameter x 40-ft. deep	45,000
Sinking	245,000
Six-inch concrete lining	289,000
Bottom station excavation and concrete	50,000
Piping, pump, and sump	24,000
	$ 713,000
MINE VENTILATING FAN	
Purchase fan, drive, controls, etc.	$ 60,000
Fan erection	25,000
	$ 85,000
COAL HANDLING & STORAGE FACILITIES	
Raw coal silo feed belt conveyor	$ 95,000
10,000-Ton raw coal silo	375,000
Payloader	34,000
	$ 504,000
OVERLAND BELT CONVEYOR SYSTEM	
Right-of-way - 3.3 miles	$ 195,000
Clearing, grading, and fencing	49,000
Belt conveyor structure, machinery, covers, and foundations	1,275,000
Belting - 36-inch	476,000
Power lines, transformers, and wiring	32,000
	$ 2,027,000
OVERLAND TRUCK HAULAGE SYSTEM	
Right-of-way - 4.1 miles	$ 255,000
Clearing, grading, and fencing	63,000
Roadway, cut and fill 22,000 ft.	264,000
Drainage structures	95,000
Crushed limestone	173,000
Truck unloading station and feeder	125,000
Silo feed conveyor	95,000
Motor grader	55,000
Tank truck sprinkler	25,000
Four - 120-ton coal haulers	610,000
Truck spare parts	60,000
Power equipment and wiring	8,000
Truck maintenance shop	175,000
	$ 2,003,000

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

DETAILS OF
HAMILTON NO. 1A MINE
CAPITAL EXPENDITURE REQUIREMENTS
(Continued)

POWER SUPPLY INSIDE	
Power equipment	$ 375,000
Cable	178,000
Cable couplers	69,000
Trolley, switches, feeder, etc.	46,000
Lighting	25,000
Communications	18,000
	$ 711,000
PRODUCTION AND ROOF BOLTING EQUIPMENT	
9 New A.C. loading machines	$ 612,000
18 Coal haulage units	792,000
9 New A.C. cutting machines	936,000
9 New roof bolting machines	180,000
9 New coal drills	182,000
Component replacement parts	270,000
	$ 2,972,000
HAULAGE AND SAFETY EQUIPMENT	
8 Supply locomotives - battery and-trolley combination	$ 208,000
4 New rail and timber trucks	8,600
1 Sand car	400
Rock dust equipment (1 main, 8 section, and 4 bantams)	190,000
84 Rubber-tired supply trailers	168,000
84 Track supply cars	168,000
Communication system, mobile	11,000
Pumps-pipe-track, initial needs only	39,000
7 Mantrip busses	60,000
8 Track jeeps	47,000
Lowboy	5,000
10 Battery-powered scoops - 8 small and 2 large	236,000
	$ 1,141,000
ROCK AND GRADING EQUIPMENT	
Used cutting machines (10RU)	$ 22,000
Used loading machines (14BU8)	22,000
Used shuttle car	22,000
Air compressor	18,000
2 Jack hammers	4,000
Rock handling system	250,000
	$ 338,000

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

DETAILS OF
HAMILTON NO. 1A MINE
CAPITAL EXPENDITURE REQUIREMENTS
(Continued)

BELT CONVEYORS AND TERMINAL GROUPS

10 - 36-Inch terminal groups	$ 213,000
21,600 Ft. rope belt structure - 36-inch	219,000
43,200 Ft. belting - 36-inch	223,000
4 - 42-Inch x 4000-ft. rope structures and conveyors, complete	691,000
9 Ratio belt feeders	315,000
	$ 1,661,000

GRAND TOTAL - OVERLAND BELT CONVEYOR SYSTEM	$15,605,000
GRAND TOTAL - OVERLAND TRUCK HAULAGE SYSTEM	$15,581,000

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

STANDARD COST REPORT

38 a

7-7-0

ISLAND CREEK COAL COMPANY
WEST KENTUCKY DIVISION
MADISONVILLE, KENTUCKY

MINE Hamilton No. 14
ISSUE
EFF. DATE

President	Mine Supt.	Div. Mgr.	Dir. Ind. Rgn.	Gen. Manager	Ch. Oper. Asst.

Based on 2400 tons clean coal per day from 14 section shifts for 5 days per week and 249 days per year, excluding holidays.
240

OPERATING DAY MINE COST

Item No.	ITEM	Men/ Day	Std. Unit	Dollars Per Day	Dollars Per Ton	Dollars/Std. Unit Day	Dollars/Std. Unit Ton
	LABOR OPERATING						
1A	Sectional	140	Day	5417	.704		
2A1	Inside - Service	36	Day	1390	.181		
2A2	- General	104	Day	4600	.597		
3A1	Outside - Prep. Plant	16	Day	660	.085		
3A2	- Surf. & Yard	11	Day	470	.061		
	Total Labor Operating	307	Day	12537	1.628		
	LABOR MAINT. & REPAIRS						
1B	Sectional	28	Day	1595	.207		
2B	Inside	16	Day	935	.122		
3B	Outside	5	Day	211	.027		
	Total Labor Maint. & Repair	49	Day	2741	.356		
	ADMINISTRATIVE LABOR						
4A1	Supery. & Clerical	36	Day	2226	.289		
4A2	Miner's Vacation	356	Day	1363	.178		
	Total Administrative Labor	392	Day	3594	.467		
	TOTAL LABOR	392	Day	18872	2.451		
	SUPPLIES OPERATING						
1C	Sectional		Ton	5998	.779		
2C	Inside		Ton	2195	.285		
4C1	Coal Treating		Ton	916	.119		
4C2	Power & Strg. Battery		Ton	1147	.149		
	Total Supplies Operating		Ton	10256	1.332		
	SUPPLIES MAINT. & REPAIR						
1D	Sectional		Ton	616	.080		
2D	Inside		Ton	103	.014		
3D	Outside		Ton	139	.018		
	Total Supp. Maint. & Repair		Ton	863	.112		
	TOTAL SUPPLIES		Ton	11119	1.444		
	OUTSIDE SERVICES						
1E	Sectional		Ton	1825	.237		
2E	Inside		Ton	392	.051		
3E	Outside		Ton	100	.013		
4E	Power & Strg. Battery		Ton	62	.008		
	TOTAL OUTSIDE SERVICES		Ton	2379	.309		
	TOTAL MINE COST			32370	4.204		
	Overhead				.968		
	Cost of Production				5.172		

*Includes vacation, paid holidays, Christmas pay and Supplemental Pay.

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

STANDARD COST BUDGET

ISLAND CREEK COAL COMPANY
MAGC KENTUCKY DIVISION
MADISONVILLE, KENTUCKY

39 a (7-7-0)
MINE HAMILTON NO. 1
ISSUE 2
EFF. DATE

President	Mine Supt.	Div. Ven.	Div. Ind. Engr.	Gen. Manager	Ch. Oper. Acc't.

Based on 2,0 tons clean coal per day from 1 section shifts for 5 days per week and 241 days per year, excluding holidays.

OPERATING DAY MINE COST

Item No.	ITEM	Men / Day	Std. Unit	Dollars Per Day	Dollars Per Ton	Dollars/Std. Unit Day	Dollars/Std. Unit Ton
	LABOR OPERATING						
1A	Sectional	140	Day	5417	.704		
2A1	Inside - Service	36	Day	1390	.181		
2A2	- General	104	Day	4460	.597		
3A1	Outside - Elec. Fitter	8	Day	374	.048		
3A2	- Surf. & Yard	10	Day	432	.056		
	Total Labor Operating	298	Day	12213	1.586		
	LABOR MAINT. & REPAIRD						
1B	Sectional	28	Day	1595	.207		
2B	Inside	16	Day	935	.122		
3B	Outside	3	Day	123	.016		
	Total Labor Maint. & Repair	47	Day	2653	.345		
	ADMINISTRATIVE LABOR						
4A1	Superv. & Clerical	36	Day	2226	.289		
4A2	Hiscmis Manitou	345	Day	1326	.172		
	Total Administrative Labor	381	Day	3552	.461		
	TOTAL LABOR	381	Day	18418	2.392		
	SUPPLIES OPERATING						
1C	Sectional		Ton	5998	.779		
2C	Inside		Ton	2195	.285		
4C1	Coal Treating		Ton	916	.119		
4C2	Power & Strg. Battery		Ton	1147	.149		
	Total Supplies Operating		Ton	10256	1.332		
	SUPPLIES MAINT. & REPAIR						
1D	Sectional		Ton	616	.080		
2D	Inside		Ton	108	.014		
3D	Outside		Ton	62	.008		
	Total Supp. Maint. & Repair		Ton	786	.102		
	TOTAL SUPPLIES		Ton	11042	1.434		
	OUTSIDE SERVICES						
1E	Sectional		Ton	1825	.237		
2E	Inside		Ton	392	.051		
3E	Outside		Ton	100	.013		
4E	Power & Strg. Battery		Ton	62	.008		
	TOTAL OUTSIDE SERVICES		Ton	2379	.309		
	TOTAL MINE COST			31839	4.135		
	Overhead				.965		
	Cost of Production				5.100		

*Includes vacation, paid holidays, Christmas pay, and Bereavement pay.

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

TABLE I
DRILL HOLE INFORMATION
NO. 9 SEAM
HAMILTON NO. 1A MINE

Hole No.	Depth, Feet	Coal Thickness, Inches
U-72	788	60
U-81	669	66
U-82	709	63
U-84	640	54
U-87	698	51
U-91	731	51
U-93	666	68
U-94	692	63
U-96	646	60
No. 4 Airshaft Site	677	69
Average	692	60.5

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TABLE II

HAMILTON NO. 1A MINE

SCHEDULE OF DEVELOPMENT & PRODUCTION

Phase	Month	Shifts	Per Shift Clean Tons Production Rate	Clean Tons Per Month
Engineering & Site Preparation	1 - 2			
Excavation of Shafts, Surface Facilities Erection	3 - 24			
Bottom Arrangement & Set Up	25 - 26			
Development Period	27	1-1-0	250	10,000
	28	1-1-0	250	10,000
	29	1-1-0	250	10,000
		1-1-0	380	15,200
	30	1-1-0	380	15,200
		1-1-0	490	19,600
	31	1-1-0	250	10,000
		2-2-0	490	39,200
	32	1-1-0	380	15,200
		2-2-0	490	39,200
	33	1-1-0	250	10,000
		3-3-0	490	58,800
	34	1-1-0	380	15,200
		3-3-0	490	58,800
	35	1-1-0	250	10,000
		4-4-0	490	78,400
	36	1-1-0	380	15,200
		4-4-0	490	78,400
	37	1-1-0	250	10,000
		5-5-0	490	98,000
	38	1-1-0	380	15,200
		5-5-0	490	98,000
	39	1-1-0	250	10,000
		6-6-0	490	117,600
	40	1-1-0	380	15,200
		6-6-0	490	117,600
Full Production	41	7-7-0	550	154,000
Total Tons				1,144,000

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STANDARD COST BUDGET

42 a (15-14-14)

ISLAND CREEK COAL COMPANY
WEST KENTUCKY DIVISION
MADISONVILLE, KENTUCKY

MINE Hamilton No. 1
ISSUE
EFF. DATE

President	Mine Supt.	Div. Mgr.	Dir. Ind. Engr.	Gen. Manager	Ch. Oper. Acc't.

Based on [illegible] tons clean coal per day from 43 section shifts for 2 days per week and 2[illegible] days per year, excluding holidays.
240

OPERATING DAY MINE COST

Item No.	ITEM	Men/ Day	Std. Unit	Dollars Per Day	Dollars Per Ton	Dollars/Std. Unit Day	Dollars/Std. Unit Ton
	LABOR OPERATING						
1A	Sectional	430	Day	15439	.756		
2A1	Inside - Service	110	Day	3930	.192		
2A2	- General	358	Day	13328	.653		
3A1	Outside - Prep. Plant	27	Day	1117	.055		
3A2	- Surf. & Yard	30	Day	1226	.060		
	Total Labor Operating	955	Day	35040	1.716		
	LABOR MAINT. & REPAIRS						
1B	Sectional	91	Day	4524	.221		
2B	Inside	33	Day	1745	.085		
3B	Outside	15	Day	561	.028		
	Total Labor Maint. & Repair	139	Day	6830	.334		
	ADMINISTRATIVE LABOR						
4A1	Supery. & Clerical	91	Day	5225	.256		
4A2	Miners Maintain.	1094	Day	2787	.136		
	Total Administrative Labor	1185	Day	8012	.392		
	TOTAL LABOR	1185	Day	49882	2.442		
	SUPPLIES OPERATING						
1C	Sectional		Ton	15911	.779		
2C	Inside		Ton	5821	.285		
4C1	Coal Loading		Ton	2430	.119		
4C2	Power & Surp. Supply		Ton	3043	.149		
	Total Supplies Operating		Ton	27205	1.332		
	SUPPLIES MAINT. & REPAIR						
1D	Sectional		Ton	1634	.080		
2D	Inside		Ton	286	.014		
3D	Outside		Ton	163	.008		
	Total Supp. Maint. & Repair		Ton	2083	.102		
	TOTAL SUPPLIES		Ton	29288	1.434		
	OUTSIDE SERVICES						
1E	Sectional		Ton	4841	.237		
2E	Inside		Ton	1042	.051		
3E	Outside		Ton	266	.013		
4E	Power & Surp. Supply		Ton	163	.008		
	TOTAL OUTSIDE SERVICES		Ton	6312	.309		
	TOTAL MINE COST			85482	4.185		
	Overhead				.755		
	Cost of Production				4.940*		

*Does not include 11/12/71 UMWA wage increas

ONLY COPY AVAILABLE

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

MINE: HAMILTON NO. 1 RECAP OF LABOR OBJECTIVE WORK SHEET EFFECTIVE DATE:

CLASS NO.	OPERATION	PER DAY STD. QUOTA	A STR. TIME COST/DAY	B DAILY O.T. COST/DAY	C SAT. O.T. COST/DAY	D SUN. O.T. COST/DAY	E 5 DAY OBJECTIVE	F IDLE DAY EXPENSE	G 4.5 DAY OBJECTIVE	H 5.5 DAY OBJECTIVE	I 6 DAY OBJECTIVE
1A	[illegible]	430	15438.65				15438.65				
2A1	[illegible]										
	[illegible]	110	3807.63		122.88		3930.51				
	[illegible]	110	3807.63		122.88		3930.51				
2A2	[illegible]	24	830.88	61.44	122.88		1015.20				
	[illegible]	15	512.10		30.29		542.39				
	[illegible]										
	[illegible]	68	2376.51	40.73	65.02	162.50	2644.76				
	[illegible]										
	[illegible]	88	2328.90	61.09	122.18		2509.17				
	[illegible]	16	550.40		30.55		580.95				
	[illegible]	24	867.00		65.10		932.10				
	[illegible]	12	434.19				434.19				
	[illegible]	16	546.40				546.40				
	[illegible]	18	617.10				617.10				
	[illegible]	97	3369.71	32.24	43.78	29.19	3475.52				
	[illegible]	358	12600.49	196.10	479.80	191.69	13388.08				
2A1	[illegible]										
	[illegible] (Rock)	6	206.58				206.58				
	[illegible]	6	703.11				703.11				
	[illegible]										
	[illegible] Dock	12	410.88		81.57	108.77	601.18				
	[illegible]										
	[illegible]	3	106.28				106.28				
	[illegible]	27	926.81		81.57	108.77	1117.15				
2A3	[illegible]	30	1092.27		121.67	81.89	1295.83				
	[illegible]	955	33655.85	196.10	805.92	382.35	35040.22				
1B	[illegible]	91	3363.79	164.29	996.07		4524.07				
2B	[illegible]	33	1200.01	104.49	361.22		1745.42				
3B	[illegible]	9	309.93		50.99		360.92				
	[illegible]	6	199.65				199.65				
	[illegible]	15	509.58		50.99		560.57				
	[illegible]	139	5073.39	328.38	1408.30		6810.07				
4A	[illegible]	91	5225.00				5225.00				
	[illegible]	10%	1000.00				1000.00				
8A	[illegible]	10%	1140.00				1140.00				
	[illegible]	10%	647.00				647.00				
	TOTAL ADMINISTRATIVE LABOR	1185	8012.00				8012.00				
	TOTAL LABOR	1185	46762.24	524.48	2214.22	382.35	49992.29				

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

MINE: HAMILTON NO. 1 — LABOR OBJECTIVE WORK SHEET — EFFECTIVE DATE

ITEM NO.	OPERATION	STD. RATE PER HOUR	FIRST SHIFT Std. Crew	FIRST SHIFT Rate/ Shift	FIRST SHIFT Cost/ Shift	SECOND SHIFT Std. Crew	SECOND SHIFT Rate/ Shift	SECOND SHIFT Cost/ Shift	THIRD SHIFT Std. Crew	THIRD SHIFT Rate/ Shift	THIRD SHIFT Cost/ Shift	TOTAL STD. CREW	STRAIGHT TIME COST/DAY	DAILY OVERTIME COST/DAY	SATURDAY OVERTIME COST/DAY	SUNDAY OVERTIME COST/DAY	IDLE DAY COST
24	SECTIONAL LABOR:																
	Lubricator																
	Electrician Helper																
	Roof Bolt Mtce.		30	35.12	1053.60	29	35.76	1001.28	28	35.92	1005.76	84	3060.64				
	Cutting Machine Operator		15	36.17	542.55	14	36.81	515.34	14	36.97	517.51	43	1575.40				
	Helper		15	36.17	542.55	14	36.81	515.34	14	36.97	517.51	43	1575.40				
	Coal Drill Operator		15	35.12	526.80	14	35.76	500.64	14	35.92	502.88	43	1530.32				
	Coal Drill Helper																
	Loader Operator		15	35.12	526.80	14	35.76	500.64	14	35.92	502.88	43	1530.32				
	Coal Haulage Miner Opr.																
	Coal Haulage Miner Helper																
	Loader Car Operator		45	35.12	1580.40	42	35.76	1501.92	42	35.92	1508.64	129	4590.96				
	Inspector - Scraper																
	Supervisor																
	Roof Bolting Machine Operator		15	36.17	542.55	14	36.81	515.34	14	36.97	517.51	43	1575.40				
	Roof Bolting Machine Helper																
	Timberman																
	SUBTOTAL SECTIONAL LABOR		150		5315.25	140		5050.50	140		5072.90	430	15438.65				
241	SHOP SERVICES: MAIN MECHANIC:																
	Electrician																
	Mechanic																
	Welder																
	Switch Tender																
	Trackman																
	Underground Mechanic																
	Supervisor:																
	Mechanic		4	34.14	204.84	4	34.78	208.68	9	34.94	314.46	21	727.98				
	Welder		15	34.14	512.10	14	34.78	486.92	14	34.94	489.16	43	1488.18				
	Lubricator Helper		15	34.14	512.10	14	34.78	486.92	14	34.94	489.16	43	1488.18				
	Supervisor																
	Electrician - Underground		1	33.65	33.65	1	34.59	34.59	1	34.75	34.75	3	103.99				
	SUBTOTAL SHOP SERVICES		37		262.94	35		1217.1	38		1327.53	110	3802.63				
	SUBTOTAL SHIFT 1 SHIFT																
242	MAINTENANCE: SHOP FOREMAN: Supervisor		8	34.14	273.12	8	34.78	278.24	8	34.94	279.52	24	830.88				
	Mechanic																
	Welder																
	SUBTOTAL SHOP FOREMEN		8		273.12	8		278.24	8		279.52	24	830.88				

MINE: HAMILTON NO. 1 — LABOR OBJECTIVE WORK SHEET — EFFECTIVE DATE

CRAFT NO.	OPERATION	STD. RATE PER HOUR	FIRST SHIFT Std. Crew	FIRST SHIFT Rate/ Shift	FIRST SHIFT Cost/ Shift	SECOND SHIFT Std. Crew	SECOND SHIFT Rate/ Shift	SECOND SHIFT Cost/ Shift	THIRD SHIFT Std. Crew	THIRD SHIFT Rate/ Shift	THIRD SHIFT Cost/ Shift	TOTAL STD. CREW	STRAIGHT TIME COST/DAY	DAILY OVERTIME COST/DAY	SATURDAY OVERTIME COST/DAY	SUNDAY OVERTIME COST/DAY	HOLIDAY COST
	FOREMAN:		1	33.66	33.66	1	34.30	34.30	1	34.46	34.46	3	102.42				
			4	33.66	134.64	4	34.30	137.20	4	34.45	137.80	12	409.64				
			5		168.30	5		171.50	5		172.30	15	512.10				
			15	33.55	503.25	14	34.59	484.26	14	34.75	486.50	43	1453.01				
									10	34.75	347.50	10	347.50				
			5	35.12	180.60	5	36.24	181.20	5	36.02	181.00	15	542.80				
			20		683.85	19		665.46	29		819.50	69	2325.31				
			30	33.55	1018.50	14	34.59	484.26				44	1502.76				
			38	33.55	1287.44	6	34.59	207.54	6	34.75	208.50	50	833.48				
			42		1425.50	20		691.80	6		208.50	68	2325.80				
			5	33.55	169.75	4	34.59	138.36	4	34.75	139.00	13	447.11				
			1	33.55	34.55	1	34.59	34.59	1	34.75	34.75	3	103.89				
			6		203.28	5		172.95	5		173.75	16	550.98				
			2	36.12	72.24	2	36.81	73.62	2	36.67	73.34	6	219.20				
			2	36.12	72.24	2	36.81	73.62	2	36.67	73.34	6	219.20				
			2	35.62	71.24	2	35.76	71.52	2	35.92	71.84	6	214.60				
			2	35.62	71.24	2	35.76	71.52	2	35.92	71.84	6	214.60				
	TOTAL SKATE AND OCS REMOVAL		28		285.16	8		290.28	8		291.56	24	867.00				

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

MINE: HAMILTON NO. 1 — LABOR OBJECTIVE WORK SHEET — EFFECTIVE DATE

ITEM NO.	OPERATION	STD. MAN HOUR PER HOUR	FIRST SHIFT Std. Crew	FIRST SHIFT Rate/ Shift	FIRST SHIFT Cost/ Shift	SECOND SHIFT Std. Crew	SECOND SHIFT Rate/ Shift	SECOND SHIFT Cost/ Shift	THIRD SHIFT Std. Crew	THIRD SHIFT Rate/ Shift	THIRD SHIFT Cost/ Shift	TOTAL STD. CREW	STRAIGHT TIME COST/DAY	DAILY OVERTIME COST/DAY	SATURDAY OVERTIME COST/DAY	SUNDAY OVERTIME COST/DAY	IDLE DAY COST
	GRADING MAINLINE:																
	Lead Man																
	Loading Machine Operator								3	36.97	110.91	3	110.91				
	Loading Machine Helper																
	Shuttle Car Operator								3	35.92	107.76	3	107.76				
	Dozer																
	Trainman																
	Rock Drill Operator								3	35.92	107.76	3	107.76				
	Rock Drill Helper																
	Laborer																
	Timber Helper																
	Shot Firer								3	35.92	107.76	3	107.76				
	Dynamite																
	Laborer Helper																
	[illegible]								12		434.19	12	434.19				
	[illegible]																
	Trainman																
	Trainer		12	33.95	407.40				4	34.75	139.00	16	546.40				
	Rail Gang Foreman																
	Track Maintainer																
	Track Maintainer Trade																
	Rail Gang Laborers		12		407.40				4		139.00	16	546.40				
	Ballast Machine																
	Ballast Machine Operator		1	36.17	36.17	1	36.81	36.81	1	36.97	36.97	3	109.95				
	Ballast Machine Helper																
	Ballast Tamper		2	35.12	70.24	2	35.76	71.52	2	35.92	71.84	6	213.60				
	Ballast		1	36.17	36.17	1	36.81	36.81	1	36.97	36.97	3	109.95				
	Ballast Regulator		1	35.12	35.12	1	35.76	35.76	1	35.92	35.92	3	106.80				
	Track Jack		1	35.12	35.12	1	35.76	35.76	1	35.92	35.92	3	106.80				
	Tie Tamper																
	Track Laborer																
	Track Laborer Trade		6		212.82	6		216.66	6		217.68	18	647.16				
	Track Welder																
	Track Welder Helper																
	Welding Machine Operator																
	Welding Machine

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MINE: HAMILTON NO. 1 — LABOR OBJECTIVE WORK SHEET — EFFECTIVE DATE

ITEM NO.	OPERATION	MAN HOURS PER HOUR	FIRST SHIFT Std. Crew	Rate/ Shift	Cost/ Shift	SECOND SHIFT Std. Crew	Rate/ Shift	Cost/ Shift	THIRD SHIFT Std. Crew	Rate/ Shift	Cost/ Shift	TOTAL STD. CREW	STRAIGHT TIME COST/DAY	DAILY OVERTIME COST/DAY	SUNDAY OVERTIME COST/DAY	BUS EXT COST
242	Continuous Miner Unit															
	Load Haul		3	33.86	99.86	3	33.61	301.83	3	33.86	301.83	9	903.66			
	Face Haul		3	34.10	102.30	3	34.70	104.10	3	34.85	104.55	9	311.00			
	Maintenance - Crew		1	34.39	34.39	1	34.91	34.91	1	35.06	35.06	3	104.36			
	Preventive Maintenance															
	Miscellaneous															
	Roof Bolters		1	34.31	34.30	1	34.91	34.91	1	35.06	35.06	3	104.30			
	Face Drillers		2	32.84	65.68	2	33.45	66.84	2	33.57	67.14	6	199.66			
	Shuttle Car Operators															
	Scoop Operators		10		336.30	10		342.35	10		343.09	30	1022.27			
	Cont. Miner Operators		246		2016.31	297		0525.59	312		11112.95	955	33655.85			
13	Intermediate & Face Attendants		31	36.49	131.19	30	37.13	1113.90	30	37.29	1113.70	91	3363.79			
	Repairmen															
	Fill & Supply															
	Cont. Miner Helpers		31		131.19	30		1113.90	30		1118.70	91	3363.79			
	Shuttle Car Operators	8	36.49	291.92	8	37.13	297.04	8	37.29	298.32	24	887.28				
	Scoop Operators	3	36.49	109.47	3	37.13	111.39	3	37.29	111.87	9	332.73				
	Roof Bolters															
	Face Drillers	11		401.39	11		408.43	11		410.19	33	1220.01				
	Shuttle Car Operators															
	Scoop Operators															
23	Cont. Miner Helpers															
	Shuttle Car Operators															
	Scoop Operators															
	Roof Bolters		1	34.00	34.00	1	34.58	34.58	1	34.73	34.73	3	103.31			
	Face Drillers		2	64.00	128.00	2	64.16	128.32	2	64.31	128.62	6	384.94			
	Shuttle Car Operators															
	Scoop Operators															
	Cont. Miner Helpers		3		162.00	3		162.90	3		163.04	9	487.94			
	Shuttle Car Operators															
	Scoop Operators															
	Roof Bolters															
	Face Drillers		2		66.63	2		66.84	2		67.04	6	200.51			
	Shuttle Car Operators															
	Scoop Operators															
	Cont. Miner Helpers		2	33.00	66.63	2	33.42	66.84	2	33.52	67.04	6	200.51			
	Shuttle Car Operators															
	Scoop Operators															
	Roof Bolters															
	Face Drillers															
	Shuttle Car Operators															
	Scoop Operators															
	Cont. Miner Helpers		5		167.63	5		170.58	5		171.13	15	509.54			
	Shuttle Car Operators															
	Scoop Operators															
	Roof Bolters		47		1700.26	46		1692.92	46		1700.42	139	5093.39			
	Face Drillers															
	Shuttle Car Operators															
	Scoop Operators															
	Cont. Miner Helpers		393		13726.57	343		12229.30	358		12813.17	1094	38769.24			
	Shuttle Car Operators															
	Scoop Operators															

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

HAMILTON NO. 1 MINE
CAPITAL EXPENDITURE FOR 23 UNITS

ITEM	COST IN THOUSANDS
PRODUCTION & FACE EQUIPMENT	
11 - New A.C. Loading Machines	$ 748
11 - New A.C. Cutting Machines	1,144
11 - New A.C. Coal Drills	220
22 - New A.C. Roof Bolting Machines	440
33 - New A.C. Shuttle Cars	1,452
1 - Lot Of Spare Components	401
Total	$4,405
HAULAGE & SAFETY EQUIPMENT	
11 - Battery-Powered Scoops	$ 231
11 - Portal Busses	99
11 - Track Personnel Jeeps	66
3 - Bulk Rock Dust Transfer Cars	72
11 - Rubber-Tired Rock Dust Distributors	198
3 - Track-Mounted Rock Dust Distributors	54
7 - Supply Locomotives	182
198 - Rubber Supply Trailers	198
132 - Rail Supply Cars	264
5 - Rail & Timber Trucks	13
11 - Powder Cars	22
11 - Cap Cars	11
2 - Lowboys	10
1 - Lot Of Pumps, Pipe, & Track	179
Total	$1,599
ROCK HANDLING EQUIPMENT	
2 - Rock Loading Mining Machines	$ 150
4 - Used Shuttle Cars	100
3 - Roof Bolting Machines	60
4 - Elevating Conveyors	60
75 - Solid-Bottom Rail Rock Cars	188
Total	$ 558

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

14 - 750 KVA Power Centers	$ 252
14 - Unit High Voltage Switchhouses	154
35,000 Ft. - 15 KV Mine Power Cable	210
Communications System, 16 Fixed, 16 Mobile	33
3 - 150 KW Rectifier For Rock Loading	15
Total	$ 664

NO. 4 AIRSHAFT & NO. 3 PORTAL

20' Diameter Shaft, New Fan, Wire Line, & Electrics	$ 819
New Elevator, Bathhouse, Parking Lot, Water System, Etc.	351
Total	$1,170

NO. 5 AIRSHAFT & NO. 4 PORTAL

22' Diameter Divided Shaft, Supply & Man Elevator, New Fan, Wire Line, & Electrics	$ 900
New Elevator, Bathhouse, Parking Lot, Water System, Etc.	450
Total	$1,350

BELT CONVEYORS & FEEDERS

1 - 54" x 2000' Belt Conveyor Complete With Belting & Electrics	$ 120
3 - 42" x 4000' Belt Conveyors Complete With Belting & Electrics	480
11 - 36" x 2400' Belt Conveyors Complete With Belting & Electrics	902
6 - 36" Belt Conveyor Drives, Take-Up, & Tail For Set-Ups	192
14 - Ratio Belt Feeders (3 for moving)	490
Total	$2,184

OUTSIDE EQUIPMENT

2 - Front End Loaders & Fork Lifts	$ 64
2 - Pick-Up Trucks	6
2 - Diesel Supply Locomotives	50
Total	$ 120

MISCELLANEOUS

Miscellaneous Tools, Equipment, & Supplies	$ 149
GRAND TOTAL	$2,199

Exhibit "A" - Report to Indiana-Kentucky Electric Corporation (IKEC) Concerning the Hamilton No. 1 Mine Pursuant to Article IV, Section 6 of the Agreement Dated December 19, 1966 - Annexed to Affidavit of James G. Park

HAMILTON IA MINE

Projected Costs

Mine Cost (1)	$5.10
Depreciation	.68
Equipment Rental	.03
Other Overheads (Selling, General and Admin. Exp., other taxes)	.32
	$6.13

(1) Based on 11/12/71 U.M.W.A. rates

REPLY AFFIDAVIT OF ROBERT C. MAYNARD, ESQ.
SWORN TO JUNE 4, 1973
IN SUPPORT OF DEFENDANT'S MOTION TO
DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF OHIO)
) SS.
CUYAHOGA COUNTY)

I, Robert C. Maynard, being duly sworn, depose and say:

(1) That I am one of the attorneys of record representing the defendant in this action;

(2) That I drafted the first proposed Submission to Arbitration of the dispute between Island Creek Coal Company and Indiana Kentucky Electric Corporation in May 1971 and sent it to Mr. James G. Park, one of the attorneys for the plaintiff, on or about May 20, 1971;

(3) That the letter attached hereto as Exhibit A is a true copy of my letter of May 20, 1971 to Mr. Park;

(4) That the proposed Submission which I sent to Mr. Park made no reference to termination or to any alleged right on the part of Island Creek to terminate the contract, nor did it contain any of the recitals in the first two

paragraphs of page 2 of the Submission agreement.

(5) That approximately one week thereafter I received from Mr. Park an amended form of the Submission which added the first two paragraphs on page 2 of the present Submission agreement, and the words "Remedy Sought by Island Creek: Termination;"

(6) That the letter attached hereto as Exhibit B is a true copy of a letter of May 25, 1971 I received from Mr. Park in which he stated "we believe that Island Creek has the right to terminate and have amended the submission accordingly;"

(7) That another change was made on the first page of the Submission by Mr. Park pursuant to a request contained in my letter of June 10, 1971 which is attached hereto as Exhibit C, and the Submission agreement in its present was received from Mr. Park with his letter of June 14, 1971 which is attached hereto as Exhibit D.

(8) That I caused the joint Submission agreement to be filed with the Cleveland Regional Office of the American Arbitration Association on June 22, 1971.

s/ Robert C. Maynard

[Duly sworn to
June 4, 1973]

Exhibit "A" - Letter dated May 20, 1971 from Robert C. Maynard to James G. Park - Annexed to Affidavit of Robert C. Maynard

SQUIRE, SANDERS & DEMPSEY

Exhibit A

May 20, 1971

James G. Park, Esq.
Buchanan, Ingersoll, Rodewald,
Kyle & Buerger
1800 Oliver Building
Pittsburgh, Pennsylvania 15222

Re: Indiana-Kentucky Electric Corporation v.
Island Creek Coal Sales Company, et al.

Dear Mr. Park:

Enclosed herewith please find the original and three copies of our proposed Submission to Arbitration of the above-captioned dispute. If your client has no objection to this joint submission, would you kindly sign and return to me the original and two copies at your earliest convenience. I will then file the original and one copy at the Cleveland Regional Office of the American Arbitration Association.

As I mentioned to you on the telephone earlier this week, I attempted to fairly represent the claims of the parties in the Submission. Your suggestion about a reference to the specific mine mentioned in the contract is included in the paragraph stating Island Creek's position. If you think that paragraph should be enlarged, modified or changed in any respect, I would appreciate your having the Submission retyped incorporating such changes, executing same and returning it to me for filing.

Thank you for your courtesy and cooperation.

Sincerely,

Robert C. Maynard

RCM:plc
Enclosures

Exhibit "B" - Letter dated May 25, 1971 from James G. Park to Robert C. Maynard - Annexed to Affidavit of Robert C. Maynard

Exhibit B

BUCHANAN, INGERSOLL, RODEWALD, KYLE & BUERGER

ATTORNEYS AT LAW

1800 OLIVER BUILDING

PITTSBURGH, PA. 15222

AREA CODE 412
TELEPHONE 281-0770

JOHN G. BUCHANAN
FRANK B. INGERSOLL
PAUL G. RODEWALD
WILLIAM J. KYLE, JR.
DAVID B. BUERGER
ELMER E. MYERS
EMORY R. KYLE
DONALD L. McCASKEY
ALEXANDER BLACK
GEORGE M. HEINITSH, JR.
EDWARD H. SCHOYER
REX ROWLAND
ROBERT F. PATTON
GLENN B. REED
JAMES G. PARK
JAMES D. MORTON
WILLIAM Y. RODEWALD
JACK G. ARMSTRONG

LOUIS EMANUEL, III
ROBERT L. FRANTZ
CLAYTON A. SWEENEY
R. SIDNEY NEUMAN
WILLIAM R. NEWLIN
ALAN BRUCE BOWDEN
GEORGE L. CASS
LARRY E. PHILLIPS
JAMES R. SWEENY
STEPHEN A. GEORGE
THOMAS M. THOMPSON
CALVIN R. HARVEY
ROBERT A. JOHNSON
M. BRUCE McCULLOUGH
JOHN J. PETRUSH
GREGORY A. PEARSON
R. DELL ZIEGLER
DAVID H. PEREZ

May 25, 1971

Robert C. Maynard, Esquire
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115

Re: Island Creek vs. Indiana-Kentucky Electric Corp.

Dear Mr. Maynard:

I have revised and enclose herewith the original and three copies of a proposed Submission to Arbitration. Please note that in our review of the file we believe that Island Creek has the right to terminate and have amended the submission accordingly.

I have signed all four copies. Would you please attach a copy of the Agreement as Exhibit A. If possible, I would like to discuss the mechanics of handling the arbitration with the Cleveland office at the time of submission. This may not be possible because of a rather hectic schedule over the next couple of weeks.

Sincerely,

James G. Park

JGP:ls
Enclosures

Exhibit "C" - Letter dated June 10, 1971 from Robert C. Maynard to James G. Park - Annexed to Affidavit of Robert C. Maynard

SQUIRE, SANDERS & DEMPSEY

Exhibit C

June 10, 1971

James G. Park, Esq.
Buchanan, Ingersoll, Rodewald,
Kyle & Buerger
1800 Oliver Building
Pittsburgh, Pennsylvania 15222

Re: Indiana-Kentucky Electric Corp. v. Island Creek

Dear Mr. Park:

Pursuant to our recent telephone conversation I return herewith the Submission to Arbitration in the above-captioned matter. Would you kindly have the first page retyped, deleting from the second full paragraph the words - "from its Hamilton No. 1 mine near Uniontown, Kentucky to IKEC's Cliffty Creek Plant near Madison, Indiana" and inserting instead the words - "to IKEC."

Secondly, would you kindly review the enclosed letter to the American Arbitration Association. If it accurately describes our agreement with respect to compensation of the arbitrators and discovery, please sign the letter and return it, together with the revised Submission, to me at your earliest convenience.

It occurs to me that since we have requested three arbitrators we ought to file four copies of the Submission, contract and guarantee, as well as four copies of the letter to the American Arbitration Association.

Thank you for your cooperation.

Sincerely,

Robert C. Maynard

RCM:plc
Enclosure

Exhibit "D" - Letter dated June 14, 1971 from James G. Park to Robert C. Maynard - Annexed to Affidavit of Robert C. Maynard

Exhibit D

BUCHANAN, INGERSOLL, RODEWALD, KYLE & BUERGER

ATTORNEYS AT LAW

1800 OLIVER BUILDING

PITTSBURGH, PA. 15222

AREA CODE 412
TELEPHONE 281-0770

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GREGORY A. PEARSON
R. DELL ZIEGLER
DAVID H. PEREZ
JOHN A. MILLER

June 14, 1971

Robert C. Maynard, Esquire
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115

Re: IKEC vs. Island Creek Coal Company

Dear Mr. Maynard:

I have revised the Submission as you requested and enclose four copies of the Submission which I have signed. I am also returning to you four copies of the letter dated June 10, which I have also signed with the request that paragraph (1) be revised so that the amount in terms of the fee to be negotiated are to be mutually acceptable to the parties.

Perhaps it would be advisable for me to plan to meet with you at the time of filing in order to isolate any other logistical problems. Would you please call me at your convenience and will will determine whether it is possible for me to be able to arrange to be in Cleveland at an appropriate time.

Sincerely,

James G. Park

JGP:ls
Enclosures

cc: Joseph L. Reynolds III, Esq.
Corporate Counsel
Island Creek Coal Company

REPLY AFFIDAVIT OF RALPH DUNLEVY
SWORN TO JUNE 4, 1973
IN SUPPORT OF DEFENDANT'S MOTION
TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RALPH DUNLEVY, being duly sworn, deposes and says:

1. I am Vice President of defendant Indiana - Kentucky Electric Corporation ("IKEC"), and I am familiar with the background of and the facts involved in this action. I submit this affidavit in support of IKEC's motion to dismiss this action.

2. As early as September 16, 1969, plaintiff Island Creek Coal Sales Company ("Island Creek") began to request price increases as the result of alleged increased costs purportedly the result of compliance with the Federal Coal Mine Health and Safety Act (the "Health and Safety Act"). See Exhibit A annexed hereto.

3. From that date forward Island Creek on many occasions complained about the impact of the Health and Safety Act and demanded price increases.

REPLY AFFIDAVIT OF RALPH DUNLEVY
SWORN TO JUNE 4, 1973 - IN SUPPORT
OF DEFENDANT'S MOTION TO DISMISS

4. On November 24, 1970 a letter agreement providing for a temporary increase in price contingent upon an audit being made by certified public accountants as to the amount of Island Creek's actual increased cost per ton with provision for a retroactive readjustment was executed. A copy of this agreement is annexed hereto as Exhibit B.

5. Further correspondence relating to the Health and Safety Act prior to June 10, 1971 is annexed hereto as Exhibit C. Said correspondence includes a letter dated May 18, 1971 which requests a further increase in price effective April 1, 1971.

6. It is clear that the dispute over alleged increased costs arising under the Health and Safety Act was very prominent well prior to the execution of the Submission to Arbitration of June 10, 1971.

7. I was present at the meeting of December 14, 197[illegible] referred to by Mr. Park in paragraph 7 of his affidavit sworn to on May 16, 1973. That meeting was devoted almost entirely to a presentation by the representatives of Island Creek of the materials contained in the memorandum which is annexed as Exhibit A to Mr. Park's affidavit. These

materials related to Island Creek's analysis of the corrective steps which would have to be taken to make it possible to deliver the coal which IKEC required. There was no occasion for any discussion of the parties' litigating posture or the scope of the previously executed Submission to Arbitration.

s/Ralph Dunlevy

[Duly sworn to
June 4, 1973]

Exhibit "A" - Letter dated September 16, 1969 from Island Creek Coal Sales Company to American Electric Power Service Corporation - Annexed to Affidavit of Ralph Dunlevy

61 a

ISLAND CREEK COAL SALES COMPANY

EXECUTIVE OFFICES

September 16, 1969

1501 EUCLID AVENUE
CLEVELAND, OHIO 44115

Mr. Edward Wesp
American Electric Power Service Corporation
Two Broadway
New York, New York 10004

Dear Mr. Wesp:

Re: Hamilton Contract - Increased Safety Costs

This refers to the very real problem of increased production costs which occurred since the first of the year because of the necessity to comply with more stringent safety standards.

As you already know, Federal mine inspection procedures in all areas, as a result of public pressures, have been drastically revised. The result has been more frequent inspections and sterner enforcement of what amounts to entirely new safety standards, and we must comply in every respect.

Fortunately, the West Kentucky area has not felt the impact of these new procedures to the extent that they have hit the Eastern fields. On the basis of a careful study at the operations level, we have made this determination of increased costs of Federal and State safety compliance:

Increased rockdust cleaning, inspection, etc. -per ton of clean coal:	$ 0.002
Increased rockdust requirements per ton of clean coal:	0.010
Total	$ 0.012

Our contract reads in part, Article IV, Section 6:

"The parties hereto also recognize the possibility that, during the continuance of this Agreement, legislative or regulatory bodies or the courts may impose regulations or restrictions relating to mining practices which will make it impossible or impractical for Seller to continue to produce coal for delivery hereunder. Such regulations or restrictions could pertain to, but would not necessarily be limited to, air pollution, water pollution, waste disposal or surface subsidence. If any such regulations or restrictions are imposed and if as a result

thereof Seller in its sole judgment decides that it will be impossible or impractical for Seller to continue to produce coal for delivery hereunder, Seller shall so advise Buyer and thereupon Seller and Buyer shall promptly consider what corrective steps they can take in the mining and preparation of the coal at Seller's mine and in the handling and combustion of the coal at Buyer's plant; and if in Seller's sole judgment such steps will not, without unreasonable expense to Seller, make it possible for Seller to continue to produce coal for delivery hereunder without violating such regulations or restrictions, Seller shall have the right, upon notice to Buyer, to terminate this Agreement without further obligation to Buyer hereunder; provided, however, that Buyer may at its option, prevent such termination by agreeing to reimburse Seller for such expense to the extent that Seller, in its sole judgment, deems such expense to be unreasonable."

The "possibility" of a regulatory body impesing regulations and restrictions "relating to mining practices" has become a reality, ad we ask your permission to increase billing as of July 14 by 1.2¢ per ton. This is the date shipments were resumed after June 30. The study covers the period of the first six months of 1969.

Sincerely,

V. M. Johnston

V. M. Johnston, Manager
Contract Administration

VMJ/eb

Exhibit "B" - Letter Agreement dated November 24, 1970 between Indiana-Kentucky Electric Corporation and Island Creek Coal Sales Company - Annexed to Affidavit of Ralph Dunlevy

INDIANA-KENTUCKY ELECTRIC CORPORATION
P. O. Box 16
Bowling Green Station
New York, New York 10004

November 24, 1970

Mr. Lloyd G. Evans, President
Island Creek Coal Sales Company
1501 Euclid Avenue
Cleveland, Ohio 44115

Dear Mr. Evans:

Confirming conversations among Island Creek and IKEC representatives, we agree to a temporary increase in the price of coal under the Coal Supply Agreement between Indiana-Kentucky Electric Corporation (Buyer) and Island Creek Coal Sales Company (Seller) dated December 19, 1966, of a tentative amount of 62.1 cents per ton, effective April 1, 1970. This tentative increase of 62.1 cents per ton is to compensate Seller for additional costs claimed because of compliance with the Federal Coal Mine Health and Safety Act of 1969 as stated in Seller's letter of June 1, 1970.

This tentative increase of 62.1 cents per ton is to continue through March 31, 1971. The tentative price, therefore, effective April 1, 1970, shall be $4.442 per ton.

It is agreed that, as soon after April 1, 1971, as practicable, an audit by a recognized firm of certified public accountants shall be made and the auditor is to be instructed to conduct the audit as follows:

1. It is agreed that Seller has incurred additional mining costs because of the Federal Coal Mine Health and Safety Act of 1969.

2. Buyer has agreed to pay the per ton amount of such increased mining costs to Seller.

3. Buyer has agreed to pay 62.1 cents per ton on a tentative basis from April 1, 1970 through March 31, 1971.

4. The auditor is to review the cost to Seller as soon as practicable after April 1, 1971, and determine a reasonable figure as to the amount of Seller's actual increased cost per ton during the twelve-month period from April 1, 1970, through March 31, 1971. The

COPY

ONLY COPY AVAILABLE

auditor may employ personnel with mining and engineering backgrounds as may be necessary, and may refer to accounting and engineering personnel of Buyer and Seller in order to arrive at a determination of a reasonable figure as to the amount of Seller's actual increased cost per ton.

5. The reasonable figure as to the amount of Seller's actual increased cost per ton shall be transmitted to both parties.

It is further agreed that a retroactive adjustment shall be made by substituting the amount determined as a reasonable figure of Seller's actual increased cost per ton in lieu of the 62.1 cents per ton tentative increase and any amount due as a result of such adjustment shall be paid promptly by Buyer or Seller, as the case may require.

It is further agreed that Buyer may engage any one of the following recognized firms of certified public accountants to perform the audit:

(a) Price Waterhouse & Co.

(b) Lybrand Ross Bros. & Montgomery

(c) Haskins & Sells

If the foregoing is in accordance with your understanding, please sign the attached copy of this letter in the space provided below and return it to us.

Very truly yours,

INDIANA-KENTUCKY ELECTRIC CORP.

Ralph Dunlevy
Vice President

Approved this 24th day of November, 1970

ISLAND CREEK COAL SALES COMPANY

By _____
President

COPY

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

ISLAND CREEK COAL SALES COMPANY

LVANS
ESIDENT

1501 EUCLID AVENUE
CLEVELAND, OHIO 44115

January 26, 1970

Mr. Edward Wesp
American Electric Power Service Corp.
? Broadway
New York, New York 10004

Dear Ed:

Please refer to our IKEC contract. In reviewing this contract with regards to the date of renegotiation, I have found certain letters in the file, which I feel justify the reopening of a case.

On September 16, 1969, our Mr. V. M. Johnston asked for an increase of $0.012, due to certain safety items. In your letter of November 17, you refused to pay this increase due to difficulties in proving this matter to the Atomic Energy Commission.

Even this increase of $0.012 is fairly small. We are asking you to reconsider this matter for the following reasons:

1. In the spring of 1969, the Bureau of Mines published, in the Federal Register, the attached changes in the interpretations of the current safety law. These changes caused the increases of $0.012 per ton.

2. With the passage of the new Federal Safety Law, this issue will become even more important.

I am sure that when the Atomic Energy Commission realizes that these extra costs were caused by changes in Federal Laws, they will be willing to pay these costs so we can comply with these new Federal Laws. Due to the importance of these safety laws, we will probably want to take other legal steps if this increase is again denied.

If you desire any additional information, please advise.

Sincerely,

Lloyd G. Evans

Lloyd G. Evans

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

C C

ISLAND CREEK COAL SALES COMPANY

1501 EUCLID AVENUE
CLEVELAND, OHIO 44115

EXECUTIVE OFFICES

April 29, 1970

Mr. Edward Wesp
American Electric Power Service Corporation
Two Broadway
New York, New York 10004

Dear Mr. Wesp:

RE: Indiana-Kentucky Electric Company
Hamilton Mine

The main provisions of the new Mine Health and Safety Act of 1969 went into effect on March 30, 1970. The principal impact on mine costs also occurred on that date, and will be fully reflective on all shipments made during April and subsequent months. Adjustment of price will necessarily be effective April 1.

We are in the process of determining what these costs will be, and this information will be submitted to you as soon as the studies are complete. The section of the law will be identified as requiring capital expenditure or continuing per-ton cost in order to achieve compliance with the law.

Thanks for your usual cooperation in these matters.

Sincerely,

V. M. Johnston, Manager
Contract Administration

VMJ/cb

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

ISLAND CREEK COAL SALES COMPANY

EXECUTIVE OFFICES

1501 EUCLID AVENUE
CLEVELAND, OHIO 44115

June 1, 1970

Mr. Paul D. Martinka
Assistant Vice President
American Electric Power Service Corp.
2 Broadway
New York, New York 10004

Dear Mr. Martinka:

Re: Hamilton Mine - Indiana-Kentucky Electric Corp.

As you already know, the overriding issue which has now imposed itself on the coal industry is the new Mine Health and Safety Act of 1969, and we had promised to report these costs as soon as they were determined. Meeting the compliance deadlines of March 30, 1970 has resulted in enormous physical problems at the mines, in large outlays for equipment and materials, and in heavy continuing per-ton production cost rises.

A copy of the new law is enclosed. Also attached is a summary listing of the provisions of the law requiring investment, new continuing costs, or both, for the Hamilton Mine.

The purpose of this letter is to report that these costs went into effect as of Monday, March 30, and will be fully reflective in the total of April shipments and into the future. Later compliance dates will occur in 1971 and 1974, but we believe the major expense has already occurred.

Secondly, we do wish to emphasize again that these costly changes are the result of Federal Law, and that our compliance is totally mandatory both from the standpoint of harsh legal penalties and under the provision of our labor contract with the United Mine Workers of America.

Compliance with the new law has, in some mines, raised moisture due to the addition and use of underground water sprays. In some mines the ash is increasing due to changing requirements in undercutting specifications. This new law has changed our quality specifications, and productive capacity, and we will advise you as soon as possible what effect this may have at Hamilton.

Excluding any adjustment in BTU value, the increase in price on the Hamilton coal as of April 1, 1970 figures to be:

FOB Mine Price Prior to April 1, 1970:	$3.821
Hamilton Safety Costs:	.621
[illegible] April 1, 1970:	$4.442

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

Your confirmation of this adjustment to prevailing prices as soon as possible will be most appreciated.

These cost figures are the result of our best efforts to determine them effective April 1, but they may be subject to further change; if so, we reserve the right to advise you of such changes should they occur.

We believe you can understand why we must press for recovery of these sizable expense outlays. If they are not recouped, the mines simply cannot operate, since the added cost items (although they vary from mine to mine) exceed profit margins several times over at the typical mine.

You may be sure we sincerely regret the necessity of going to you with this story on costs; but we have no alternative.

Sincerely,

V. M. Johnston, Manager
Contract Administration

VMJ/eb

HAMILTON MINE

SAFETY COSTS AS OF MARCH 30, 1970

MINE HEALTH & SAFETY ACT OF 1969

SECTION	CAPITAL OUTLAYS	CONTINUING COST
303 (r)	$ 28,800	$0.020
303 (b)	10,000	-
303 (c)	-	0.132
303 (d)(1)	-	0.002
202 (a)(h)(1-6)	26,150	0.002
304 (b)	31,300	0.021
304 (z)(2)	15,000	0.009
317 (a)	14,616	-
306 (a)	295,000	0.088
303 (h)	21,300	0.005
305 (e)	-	0.001
303 (y)(1)	36,207	0.047
311 (f)	12,800	0.004
110 (a)	-	0.002
203 (a)	10,880	0.001
202 (a)	2,712	0.005
306 (d)	111,900	0.128
317 (i)	1,875	0.001
317 (s)	234	-
303 (k)(1)	36,000	0.008
303 (d)(1)	2,520	0.001
303 (d)(1)	1,162	0.093
107 (d)	-	0.005
311 (f)	6,540	0.001
302 (d)	1,416	-
206	12,000	0.001
Total Continuing Cost		$0.577
Depreciation and Amortization		.044
		$0.621

VMJ

June 1, 1970

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

ISLAND CREEK COAL SALES COMPANY

EXECUTIVE OFFICES

1501 EUCLID AVENUE
CLEVELAND, OHIO 44115

July 16, 1970

Mr. R. D. Dunlevy
Vice President
Indiana-Kentucky Electric Corporation
P. O. Box 18
Bowling Green Station
New York, New York 10004

Dear Mr. Dunlevy:

We acknowledge your letter of July 9, 1970, authorizing a tentative increase in the price of coal under our Coal Supply Agreement to compensate for costs incurred as a result of compliance with the Federal Coal Mine Health and Safety Act of 1969. We appreciate your willingness to make this adjustment pending final agreement between us with respect to our claim.

While we certainly have no objection to the audit requested in your letter, we are unable to agree that its purpose should be to determine the actual amount, if any, due Seller but rather to verify the accuracy of our computations.

Our claim for recovery of safety costs is based upon and clearly comes within the meaning and intent of Article IV, Section 6, of the Coal Supply Agreement. We have determined the cost of compliance with the new law on the basis of sound engineering practice and, in our judgement, failure to obtain full recovery of the costs imposed upon us would make it economically impractical to continue to produce coal for delivery under our present agreement.

We would welcome a review of the manner in which we have complied with the safety law by a consulting engineering firm of your selection, and we believe that such review would be of much greater value to you in evaluating our claim than an accounting-type audit.

Until we reach final agreement in this matter, we request and will appreciate your authorization to apply, on an interim basis, the increase as outlined in the first paragraph of your letter of July 9.

Very truly yours,

J. E. Tobey, Jr.
Vice President - Marketing

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

THIS COPY FOR RALPH DUNLEVY

71a

INDIANA-KENTUCKY ELECTRIC CORPORATION

September 24, 1970

Mr. Lloyd Evans, President
Island Creek Coal Sales Company
Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115

COPY

Dear Mr. Evans:

On July 2, 1970, Ralph Dunlevy communicated to Island Creek IKEC's willingness to pay a tentative amount of 62.1¢ per ton as a temporary price increase under our coal supply agreement because of increased costs claimed to result from the operation of the Mine Health and Safety Act of 1969, with the increase to be subject to audit to determine the actual amount due Seller and with retroactive adjustment to be made as to overpayments or underpayments.

We agreed to the tentative increase in price because we recognized that Island Creek could demonstrate that its costs have increased and we deemed it a fair arrangement to estimate the amount due Island Creek and pay it now, with the understanding that the actual amount due would be determined by audit, rather than wait until we reached agreement as to the exact amount of increase to which Island Creek may be entitled. In this way Island Creek would not have to wait for reimbursement for money paid out because of any additional expenses.

I understand, however, that you and Ralph have been unable to agree as to the terms of a letter agreement providing for the tentative increase. I further understand that the point of contention is not whether IKEC should pay the increased costs brought about by the Safety Act, but rather whether our contract permits IKEC to request that an audit be conducted to determine the actual amount to which Island Creek is entitled.

It is our belief that IKEC does have a right to require an audit to determine the actual amount due and we request that this audit be made. If you will refer to Section 8 of Article VI of our contract, you will note that it states in part: "Each of the parties hereto shall have the right at all reasonable times, upon written notice to the other, to require an audit of the appropriate records and books of account for

the purpose of verifying the calculations of price revisions, the basis of such revisions, ...". We believe this language is very clear and explicitly requires that an audit be made, and that it be for the purpose of verifying both the calculations of price revisions and the basis of such revisions.

Apparently Island Creek bases its refusal to permit an audit on the terms proposed in our letter to you of September 2, 1970 upon the language of Section 6 of Article IV of our contract. We believe there is a substantial question whether this Section applies at all to the matters presently under discussion and do not thus concede that its language is pertinent. However, even assuming hypothetically that it does apply, we think you should again look at the portion of Section 6 of Article IV which reads: "... Buyer may, at its option, prevent such termination by agreeing to reimburse Seller for such expense to the extent that Seller, in its sole judgment, deems such expense to be unreasonable." As you will note, again assuming hypothetically that the law makes it "impractical" to continue to produce coal under the contract, the Section does not state that the Seller shall in its sole judgment determine the amount of the expense resulting from the law's operation, only that the Seller may determine in its sole judgment the extent to which such expense is unreasonable. Your theory, then, appears to be that 100% of such expense is unreasonable; we believe that a more appropriate arrangement would be for Island Creek to bear some portion of the increased expense itself rather than pass it all to customers.

In our view, then, Buyer has a right to require an audit to verify not only the accuracy of the calculations, but also the propriety of the costs and other bases upon which the claimed increase is based. We are aware of the impact of the law, and we believe we have demonstrated this by agreeing to a tentative price increase. You should understand, however, that since the tentative increase amounts to approximately $1,500,000 per year in increased costs to IKEC, we believe that this transaction will undoubtedly be closely examined by auditors for our principal customer, the Atomic Energy Commission, and that we would be subject to criticism if we did not require an audit to verify the amount to which Island Creek is entitled.

Sincerely yours,

/s/ Donald C. Cook

Donald C. Cook
President

DCC/cbc

bc: Ralph Dunlevy

COPY

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

ISLAND CREEK COAL SALES COMPANY

EXECUTIVE OFFICES

October 28, 1970

1501 EUCLID AVENUE
CLEVELAND, OHIO 44115

Xerox to R. Dunlevy-
P. Monahan

Mr. Edward Wesp
American Electric Power Service Corporation
Two Broadway
New York, New York 10004

Dear Mr. Wesp:

The UMW daily rate increased $2.38 on October 1, and the price adjustment on Hamilton coal is hereby calculated:

	Increased Daily Cost of One Union Man
Wage Increase:	$2.0000
District Wage Adjustment:	0.3800
Vacation Pay -- $2.38 x 10 divided by 235 days:	0.1013
*Holiday Pay - 1969: $2.38 x 8 divided by 235:	0.0810
Holiday Pay - 1970: $2.38 x 8 divided by 235:	0.0810
32% of man entitled to one more day of vacation -- $34.96 daily pay x 32% divided by 235 days:	0.0476
Payroll Taxes (6% of above):	0.1615
Unavoidable overtime (5% of above):	0.1426
Total	$2.9950

At this point the contract calls for applying 45 tons per man to arrive at a factor, but the enactment of the Mine Safety Law necessitates a revision in the base. (Incidentally, actual productivity at Hamilton for the past year is under 25 tons per man day.)

We have, I believe, discussed the fact that the Safety Act must affect both the labor base and the supplies base; in other words, the increase in these bases is the result of structural increases in the amount of labor and supplies forced upon us by law, and are not the result of price and cost increases per unit -- as would be covered by normal escalation.

* Correction in Manuscript

You have the 16-page showing which sets forth the cost of compliance with the Safety Act in 33 categories. Safety costs as projected at the Hamilton Mine can be classified as follows (see showing attached):

Labor	$0.396
Supplies	0.181
Depreciation	0.044
Total	$0.621

Since the Safety Act is the influence requiring an adjustment in the labor base, as expressed in the productivity factor, the logical basis for the adjustments is the relationship of the labor cost increase to the calculated labor cost before the impact of the Safety Act. As set forth in the 16-page showing for Hamilton, the calculated labor cost before was $1.069, rising $0.396 to $1.465 afterward.

(If 536 men produce 18,700 tons per day at a labor cost of $1.069 per ton, the productivity is 33.512 tons per man. The payroll is $19,990.30, or $35.82 per man.)

(If 556 men are paid $1.465 per ton, with the payroll $19,990.30, the production becomes 13,645.2 tons, or 24,453 tons per man.)

(The reduction is, therefore 27.0%.)

The resulting reduction in productivity is 27.0%, giving 32.85 tons as the revised per man daily output.

Dividing the $2.9950 by 32.85 tons equals $0.0912 times 134% equals 12.2¢ per ton as the labor increase October 1, 1970.

The supplies base in the contract was $0.89, and as of January 1, 1970 escalation had added 4¢, even, making it 93¢. The procedure for incorporating the supplies cost under the Safety Act into the base would seem to be to calculate the supplies escalation as of April 1, when the Safety Act took effect, and determine a new Index for March to be used as a new base for escalation:

	Dec. 1969	March 1970		June 1970	
	Composite	Index	Composite	Index	Composite
5.4% Lubricating Materials	6.17	114.3	6.17	114.3	6.17
7.3% Explosives	8.95	119.0	9.04	119.3	9.07
[illegible] Rubber	8.20	123.3	7.89	123.0	7.87
[illegible] Machine Bolts	25.10	152.1	25.10	166.2	27.41
[illegible] Mine Mach. & Equip.	83.14	132.0	84.61	132.7	85.0[illegible]
	131.56		132.81		135.56

Applying the change from March 132.81 to December 131.56 (plus 0.95%) to the 93¢ gives $0.009, or a new base of $0.939 for supplies. June change from March is equal to 2.9%, and applied to the suggested new base of $0.939 equals an increase of $0.028.

The resulting price on the various dates then becomes as follows, including the previously requested increase due to the Safety Act:

Price January 1, 1970	$3.821
Safety Costs 4-1-70	.621
Supplies adjustment 4-1-70	.009
Price 4-1-70	$4.451
Supplies Adjustment 7-1-70	.028
Price 7-1-70	$4.479
Labor Cost Adjustment 10-1-70	.122
Price 10-1-70	$4.601

Please let us have your comments. The contract should be amended to reflect these new labor and supplies bases when and if you agree with our method of making the adjustment.

Sincerely,

V. M. Johnston, Manager
Contract Administration

VMJ/eb

Attachment

P.S. Through inadvertence, we omitted including the Holiday cost in our 10-1-69 calculations. We will ignore the omission for the 12 months, 10-1-69 to 9-30-70, picking it up effective 10-1-70 only.

V.M.J.

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

HAMILTON MINE

	LABOR	SUPPLIES	TOTAL
303 (r)	-	$0.020	$0.020
303 (e)	$0.119	0.013	0.132
303 (d)(1)	0.002	-	0.002
202 (a)(b)(1-6)	-	0.002	0.002
303 (b)	-	0.021	0.021
304 (z)(2)	0.009	-	0.009
304 (a)	0.027	0.061	0.088
303 (h)	-	0.005	0.005
305 (c)	0.001	-	0.001
303 (y)(1)	0.020	0.027	0.047
311 (f)	-	0.004	0.004
110 (a)	0.002	-	0.002
203 (a)	-	0.001	0.001
202 (n)	-	0.005	0.005
306 (c)	0.118	0.010	0.128
317 (i)	-	0.001	0.001
303 (k)	-	0.008	0.008
303 (d)(1)	-	0.001	0.001
303 (d)(1)	0.093	-	0.093
107 (d)	0.005	-	0.005
311 (f)	-	0.001	0.001
206	-	0.001	0.001
	$0.396	$0.181	$0.577

Recap:		
	Labor	$0.396
	Supplies	0.181
	Depreciation	0.044
		$0.621

October 1, 1970
VMJ

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

ISLAND CREEK COAL SALES COMPANY

L. G. EVANS
PRESIDENT

1501 EUCLID AVENUE
CLEVELAND, OHIO 44115

January 29, 1971

Mr. Ralph Dunlevy
Vice President
Indiana-Kentucky Electric Corporation
P.O. Box 18
Bowling Green Station
New York, New York 10004

Dear Ralph:

As you are well aware, we are having serious problems at the Hamilton Mine. The impact of the Federal Mine Health & Safety Act of 1969 has been far more severe than anticipated; however, we are continuing to ship available tonnage to our contract accounts on a pro rata basis.

I suggest that we meet at your earliest convenience to discuss the matters raised in your letter of January 8. Would you please call me so that we can make the necessary arrangements.

Sincerely yours,

Lloyd G. Evans

LGE/mc

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

February 24, 1971

Mr. Julian E. Tobey, Jr.
Vice President, Marketing
Island Creek Coal Sales Company
1501 Euclid Avenue
Cleveland, Ohio 44115

Dear Julian:

I was somewhat surprised to receive a telephone call from Vern Johnston on February 16 asking me if I had reviewed his letter of January 12, 1971 in which he attempted to explain why he had not used the minimum productivity of 45 tons per union production employee per day as called for in the IKEC Coal Supply Agreement when he developed the price increase that is to be effective on October 1, 1970. As I recall when you and Lloyd Evans visited this office on January 25, 1971, I expressed the thought that we should escalate the price for wage changes in accordance with the Agreement and that if this did not cover all of your increased costs as a result of lower productivity resulting from the 1969 mine safety law, that we should include the difference when the cost of mine safety was determined by our annual review. You mentioned that you would consider this suggestion and advise me further.

In talking with Mr. Johnston I mentioned my discussion with you on January 25, and I agreed that I would again review his letter of January 12, 1971. I have done so, and I still feel that we need to adjust for wage increases as covered by the Agreement and to fully compensate you for the increase resulting from mine safety. Enclosed is a Xerox copy of page 2 of the illustration attached to Mr. Johnston's letter of January 12. You will note that I have added two new columns to the table at the bottom of page 2 showing that the labor cost for safety can be escalated separately as shown in column C. When Columns B and C are added to give the results in new column E, then you will receive the same labor escalation as listed in the table on the top of page 2.

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

I would appreciate your reviewing this and letting me know whether you are agreeable to handling this problem as I have proposed. IKEC still owes you money for coal delivered after October 1, 1970 and there is no reason why we should not pay what we owe. I would suggest therefore, that you send me a new computation following the provisions of the Agreement, so that we can issue the usual letter agreement and pay you the additional sum due.

Very truly yours,

Edward Wesp
Manager of Coal Purchasing

EW:ac

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

ISLAND CREEK COAL SALES COMPANY

EXECUTIVE OFFICES

1501 EUCLID AVENUE
CLEVELAND, OHIO 44115

March 8, 1971

Mr. Edward Wesp
Manager of Coal Purchasing
American Electric Power Service Corporation
Two Broadway
New York, New York 10004

Re: IKEC Labor and Supplies

Dear Ed:

As outlined in your letter to Julian Tobey of February 24, we are restating the October 1, 1970 increase as you suggested in order to reduce the dollar amount outstanding. This is, of course, subject to any modification that may result from whatever future agreement we may reach with regards to the safety costs and productivity and how they should be handled.

On October 28, 1970, we set forth the "Increased Daily Cost of One Union Man" resulting from the October 1, 1970 U.M.W. contract increase in the daily wage. The amount as determined was $2.9950 per day, and applying the 45 tons per day as stated in the contract equals $0.066 per ton, multiplied by 134%, or a price adjustment of $0.089 per ton.

From your February 24 letter, we assume you expect us to also consider at this time including the escalation adjustment for the labor segment of the safety costs. To do this, a relationship between the $0.396 and the labor cost prior to 10-1-70 needs to be established.

The agreed daily wage when the contract was written was $29.80. Divided by 45 tons per man and multiplied by 134%, this calculates to a labor cost of $0.887 per ton. Additions prior to 10-1-70 in this cost per ton gave the following:

Base:	$0.887
10-1-68 increase:	0.126
10-1-69 increase:	0.084
Labor cost prior to 10-1-70, as per contract:	$1.097

The $0.396 safety labor increase is 36.1% of the $1.097. Therefore, the escalation as of 10-1-70 attributable to safety law labor costs would be 36.1% of the $0.887 shown above, or $0.032.

While your letter of February 24 did not mention the supplies adjustment, we can assume you wish to handle it as per the contract, with safety calculated separately and tentatively.

The June Composite Index level as reported to you in our letter of October 28 was 135.59, and the December 1970 level was as follows:

	December, 1970		
	Weight	Index	Composite
Lubricating Materials	5.4%	114.3	6.17
Explosives	7.6%	120.2	9.14
Lumber	6.4%	120.4	7.71
Machine Bolts	16.5%	166.2	27.42
Mining Machinery & Equipment	64.1%	134.8	86.41
	100.0%		136.85

The July 1, 1970 increase for supplies:

$\frac{135.59}{125.85}$ = 7.74% increase times $0.89 = $0.069,
less $0.040 already added, or $0.029

The January 1, 1971 increase for supplies:

$\frac{136.85}{125.85}$ = 8.74% increase times $0.89 = $0.078,
less $0.069 already added, or $0.009

Again assuming that you expect us to calculate the increase for supplies due to safety in the same manner as we have done for labor cost:

Supplies Base in Contract:	$0.890
1-1-69 added	0.017
7-1-69 added	0.012
1-1-70 added	0.011
Supplies Base prior to safety	$0.930

The supplies amount in the safety costs as per our letter of October 28 was stated to be $0.181, and this is 19.5% of the $0.93 shown above. Applying this 19.5% to the contract amount of the supplies escalation:

July 1, 1970:	$0.029 x 19.5% =	$0.006
January 1, 1971:	$0.009 x 19.5% =	$0.002

Summing the foregoing gives price levels effective 7-1-70, 10-1-70 and 1-1-71 as follows:

Price 4-1-70 including tentative safety:	$4.442
Supplies 7-1-70 per contract	.029
Supplies 7-1-70, due to safety	.006
Price 7-1-70	$4.477
Labor 10-1-70 per contract	.089
Labor 10-1-70 due to safety	.032
Price 10-1-70	$4.598
Supplies 1-1-71 per contract	.009
Supplies 1-1-71 due to safety	.002
Price 1-1-71	$4.609

We note that you have not included in your billing instructions the 5¢ reduction called for under the contract as of 1-1-71, and assume you are holding this matter in abeyance pending the resolution of the various items now under negotiation.

Please let me have your approval of or comment on the above as soon as possible.

Sincerely,

V. M. Johnston, Manager
Contract Administration

VMJ/eb

P.S. A copy of the BLS release relating to the December indexes is enclosed.

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Danlevy

ISLAND CREEK COAL SALES COMPANY

EXECUTIVE OFFICES

1501 EUCLID AVENUE
CLEVELAND, OHIO 44115

May 18, 1971

Mr. Edward Wesp
Manager of Coal Purchasing
American Electric Power Service Corporation
Two Broadway
New York, New York 10004

Re: Safety Costs - Hamilton Mine - 1970 and 1971
(Indiana-Kentucky Electric Co.)

Dear Mr. Wesp:

After a full year of operations under the Safety Act of 1969, it is now necessary to re-evaluate the cost determinations made last year and to estimate the cost of 1971 compliance. Our letter of June 1, 1970, on the subject pointed out that a further examination of the Safety Act's impact might be required.

Enclosed for your confidential use is a copy of our 16-page redetermination of these costs. May we refer you to the cover sheet which summarizes the situation as we see it now, with the proviso that additional adjustments -- up or down -- could be necessary in the light of future developments:

Section I - This recalculates 1970 costs and adds the figure for estimated 1971 compliance.

Section II - This states the amount of overhead costs due to permanent production loss.

Section III - This summarizes the total increased costs per ton for which we are asking remuneration effective April 1, 1971.

You will, of course, wish to examine the backup material in the other 15 pages. We believe you will find it factual and explanatory concerning the problems involved.

The increase of 48.7¢ being asked of you as of April 1, 1971, consists of these items:

Increase in original 1970 calculation:	+ $0.304
Estimated continuing cost of 1971 compliance:	+ 0.039
Depreciation or amortization on 1971 capital outlays:	+ 0.001
Increased overhead cost:	+ 0.143
Total	+ $0.487

The calculation of the overhead expenses is made, we feel conservatively, against the original design tonnage.

18,700 daily x 230 days =	4,301,000 tons
$1,498,853 ÷ 4,301,000 =	$0.348

(The overhead dollars for 1969 are known, but the mine did not work at full capacity the entire year. Thus, in fairness to you, we have calculated 1969 overhead using the design tonnage.)

The increase in overhead is arrived at by applying the design tonnage after the Safety Act, instead of the actual tonnage which is much lower, of course:

13,277 x 230 days =	3,053,710 tons
$1,498,853 ÷ 3,053,710 =	$0.491
Increase in overhead:	$0.143

May we also observe that this overhead item, while applicable on a cost basis with the effective date of the Safety Act (March 30, 1970) is being requested to start only with April 1, 1971.

We do appreciate your careful consideration and continued cooperation. This Safety Act is the most serious blow to underground efficiency that has ever struck the industry. We regret the necessity of a further increase, but we have no choice but to pass along these costs to our good customers.

These costs have been carefully calculated and audited internally, and we ask your prompt corroboration so that billing may be adjusted accordingly.

Sincerely,

V. H. Johnston, Manager
Contract Administration

VHJ/eb

Enclosure

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

Servi Corporation
2 Broadway, New York, N.Y. 10004
(212) 422-4300

May 24, 1971

Mr. V. M. Johnston
Manager Contract Administration
Island Creek Coal Sales Company
1901 Euclid Avenue
Cleveland, Ohio 44115

Dear Mr. Johnston:

Thank you for your letter of May 18, 1971 attaching your calculations of the mine safety costs at Hamilton Mine.

I interpret your letter to mean that in the twelve month period from April 1, 1970 through March 31, 1971 your mine safety costs at Hamilton have been $0.925 per ton instead of the tentative cost of $0.621 per ton established by item 3 of the letter agreement dated November 24, 1970 between IKEC and Island Creek, and so you are thus requesting an additional payment of $0.304 per ton for the coal delivered in that period. We will, of course, want the safety cost verified by a certified public accountant as provided for in said letter agreement.

In your letter of May 18, 1971 you mention that your 16 pages of calculations are for our confidential use. In arranging with one of the certified public accountants to audit the safety costs, I thought it would be appropriate to give him the following information so he can get started:

1. A copy of the Coal Supply Agreement dated 12/19/66.

2. A copy of each of the following letter agreements between IKEC and Island Creek dated 1/21/69, 5/19/69, 8/18/69, 4/15/70, 11/24/70, and 4/5/71.

3. A copy of your letter dated May 18, 1971 and your 16 pages of calculations attached thereto.

4. A copy of this letter.

Please advise if this is satisfactory to you. Do you wish the C.P.A. of our choice to contact you directly, or should he contact some other person in your organization?

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

86 a

In the meantime in order to avoid any misunderstanding, I am advising the UKEC people to continue to pay the tentative increase of $0.621 per ton for coal delivered after April 1, 1971. The letter agreement of November 24, 1970 limited the tentative increase to a specific 12-month period and it would not be reasonable to reduce that increase to zero on April 1, 1971.

Very truly yours,

EW

EW:ac

Edward Wesp
Manager of Coal Purchasing

bc: R. D. Dunlevy
P. D. Martinka
W. E. Olson
I. O. Hawk
T. R. Ward
E. W. Schwarm
J. S. Johnson
K. W. Brown
E. F. Eckhardt

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

ISLAND CREEK COAL SALES COMPANY

87a

EXECUTIVE OFFICES

1501 EUCLID AVENUE
CLEVELAND, OHIO 44115

June 2, 1971

Mr. Edward Wesp
Manager of Coal Purchasing
American Electric Power Co., Inc.
2 Broadway
New York, New York 10008

Re: Hamilton Safety Costs

Dear Ed:

Referring to your letter of May 24, 1971, we are not, of course, requesting additional safety retroactive to April 1, 1970.

What we are asking is permission to bill you an additional $0.487 effective this past April 1, 1971. Since the amount is sizable, we ask your permission to make this billing back to April 1 effective immediately, subject to whatever audit is agreed upon.

In other words, we wish to add the 48.7¢ to the current price of $4.519 which includes 62.1¢ safety from 1970, making the price effective 4-1-71 to read as follows:

Current Price:	$4.519
1970-71 Safety:	0.487
Price as of 4-1-71	$5.006

I have referred your question about audit to Mr. Harry Hoate, and you will hear from him. In the meantime, we ask you to approve billing at $5.006 effective April 1, 1971.

Sincerely,

V. M. Johnston, Manager
Contract Administration

VMJ/eb

cc: Mr. H. F. Hoate
Mr. L. G. Evans/Mr. W. M. Mason
Mr. E. R. Book
Mr. J. E. Tobey, Jr.

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

ISLAND CREEK

Inter-Office Memorandum

TO: Mr. E. E. McBurney

FROM: R. D. Herron

DATE: May 23, 1969

SUBJECT: State and Federal Inspections - Extra Cost

Copies to:

Per your phone request, the following summary shows the current additional cost due to pressures from State and Federal Mine Inspectors. This picture changes after each inspection but these estimates are current.

MINE	INCREASED COST PER TON	COST OF ADDITIONAL EQUIPMENT REQUIRED
Fies	.024	$31,000.00
Crescent	.012	5,700.00
Williams	.097	1,800.00
Atkinson	.038	4,700.00
Uniontown	.039	24,000.00
Hamilton	.012	55,000.00
East Diamond	.017	30,000.00

The increase in mine cost per ton, we are already incurring. The cost of additional equipment has only been in part as we will be purchasing the additional safety equipment on mine cost and asking for the major facilities and equipment on capital appropriations.

Attached are detailed breakdowns on these costs and needs. Please advise if there is any question.

R. D. Herron

RDH:lg

Attachments

ONLY COPY AVAILABLE

Exhibit "C" - Correspondence Relating to the Health and Safety Act prior to June 10, 1971 - Annexed to Affidavit of Ralph Dunlevy

Increased cost due to current pressures from State and Federal inspectors in application of their authority.

1. ADDITIONAL LABOR
None

2. ADDITIONAL MATERIALS AND SUPPLIES

Additional Rock Dust	$ 80.00 per day
Water Softener	16.00 per day
Ventilation Material	40.32
	$136.32 per day

$136.32 ÷ 13,500 tons C. C. per day = .010 per ton

3. ADDITIONAL FACILITIES AND EQUIPMENT IN OPERATION

Water Softening Facilities	$ 700.00
Equip Belt Drives With Pressure Water System with Heat Ruptured Valves	600.00
Automatic Sprinkler System at Belt Drives	1590.00
Two Shop Made Dust Spreaders	2000.00
Twelve Trickle Dusters	30000.00
Re-locate Rockdust Bin	15254.00
	$50144.00

4. ADDITIONAL SAFETY EQUIPMENT

20 Fire Extinguishers	$ 800.00
16 Roof Jacks	320.00
9 Methane Detectors	2700.00
9 Anemometers	900.00
	$4720.00

5. LOSS OF MANAGEMENT TO SPECIAL ATTENTION OF EXTRA INSPECTORS
Cost -- .002 per ton

6. LOSS OF TIME DUE TO SHUT DOWN AND CLOSURES
On April 11th, 1969 an "A" Notice was issued for Belt Spillage. Four unit shifts were lost due to this closure. 3,372 tons of C. C. were lost.

7. UNDUE EXTRA TIMBERING TO SATISFY DESIRES OF INSPECTORS
None to Date

8. EXTRA INSPECTIONS AND DATA KEEPING OF OUR OWN
Methane check is made and recorded on each unit at the end of the day shift. This is a pre-shift examination for the second shift.
Anemometer reading is taken and recorded on each unit at the end of the day shift.
A Methane check must be made in the main return of each split every four hours. This is recorded. An Anemometer reading is also taken and recorded.

Total increase in cost per ton -- .012

Total cost of Facilities and Equipment $54,864.00

OPINION BY BAUMAN, J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ISLAND CREEK COAL SALES COMPANY,

Plaintiff,

-against-

INDIANA-KENTUCKY ELECTRIC CORPORATION,

Defendant.

----------x

OPINION

73 Civ. 564

~~#~~ 47038

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
NOV 21 4 08 PM '73

APPEARANCES

Phillips, Nizer, Benjamin, Krim & Ballon, New York City (Simon Rose, of counsel) and Buchanan, Ingersoll, Rodewald, Kyle & Buerger, Pittsburgh, Pa. (James G. Park, Bruce A. Americus, of counsel) for plaintiff.

Cahill, Gordon & Reindel, New York City (Raymond L. Falls, Jr., Joel C. Balsam, of counsel) and Squire, Sanders & Dempsey, Cleveland, Ohio (John Lansdale, Robert C. Maynard, Isaac Schulz, of counsel) for defendant.

BAUMAN, D. J.

This is a motion by defendant Indiana-Kentucky Electric Corporation (hereinafter "IKEC") for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.[1/] Because the question presented is exclusively one of contractual interpretation, I am satisfied that there is no genuine issue as to any material fact. For the reasons that follow, defendant's motion for summary judgment is granted.

Island Creek Coal Sales Company (hereinafter "Island Creek"), plaintiff herein, is engaged primarily in the business of marketing coal mined by its parent, Island Creek Coal Company. IKEC is a public utility incorporated under the laws of the State of Indiana. On December 19, 1966 the parties entered into a Coal Supply Agreement pursuant to which plaintiff was to supply coal to defendant from plaintiff's Hamilton No. 1 mine in western Kentucky. The deliveries were to commence between March 1 and September 1, 1968, and extend through December 31, 1982. Although the agreement is a highly detailed document of 43 pages, the instant controversy revolves around but two of its provisions: Article IV, § 6,[2/] which concerns conditions under which either party in its "sole judgment" might terminate the agreement, and Article VI, § 12,[3/] which concerns submission to arbitration.

In 1968 and 1969 deliveries of coal were made in accordance with the terms of the contract. In 1970, however, Island Creek was unable to make delivery in the quantities specified in the agreement, attributing this inability, then as now, to the passage of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801 et seq., which became effective March 30, 1970.

On June 10, 1971, pursuant to Article VI, § 12, the parties executed a joint submission to arbitration, which is set forth in full in the appendix to this opinion. In it, the parties presented for resolution the following questions: 1) whether Island Creek was obligated to deliver to IKEC not less than 2,125,000 nor more than 2,500,000 tons of coal in 1971 in accordance with Article III,

§ 1 of the Coal Sales Agreement; 2) to what extent IKEC was damaged by Island Creek's failure to deliver 400,000 tons of coal in 1970 and 1,000,000 tons in 1971; 3) whether and to what extent the Federal Mine Health and Safety Act of 1969 relieved Island Creek of its obligations under the agreement; 4) whether Island Creek was entitled to terminate the agreement under the provisions of Article IV, § 6, or under the force majeure clause of Article VI, § 5, or under Article 2-615 of the Uniform Commercial Code; 5) whether the curtailment in the development of the Hamilton No. 1 mine occasioned by governmental regulations entitled Island Creek to equitable adjustment or termination of the agreement. The remedy there sought by IKEC was "Specific Performance and Damages", and that sought by Island Creek was "Termination".

Subsequently the parties agreed to consider what corrective measures could be taken by Island Creek that would enable it to comply with the recent federal legislation and yet meet its commitments under the Coal Supply Agreement. A meeting was held on December 14, 1971 at which representatives of Island Creek produced a report purporting to comply with the requirement of Article IV, § 6 that the parties consider "corrective steps" before termination. The report concluded as follows: "Island Creek has determined that such steps will not make it possible for Island Creek to continue to produce coal for delivery to IKEC without unreasonable expense to Island Creek as hereinbefore described." In the ensuing months this remained plaintiff's position and finally, on July 20, 1972, its chairman wrote to IKEC giving notice that Island Creek was invoking its right to terminate pursuant to Article IV, § 6.

When IKEC then attempted to press ahead with the arbitration Island Creek commenced the instant action, in which it seeks, in essence, a declaratory judgment that its decision to terminate the agreement was not arbitrable but was rather, in the language of Article IV, § 6, a matter within its "sole judgment". The arbitration has been held in abeyance pending the outcome of this case.

In moving for summary judgment, defendant advances two basic arguments. First, it contends that Article IV, § 6 by its terms does not leave all matters relating to termination within Island Creek's sole judgment. Specifically it argues that arbitration should determine whether the Federal Mine Health and Safety Act of 1969 comes within the definition of the "regulations or restrictions relating to mining practices" set forth in that section, and that arbitration should also determine whether Island Creek's decision to terminate resulted from such regulations. Arbitration, in other words, must determine whether the prerequisites to Island Creek's exercise of its sole judgment have been met. The second argument advanced by IKEC is that regardless of the construction of Article IV, § 6, Island Creek in fact submitted to arbitration on June 10, 1971 the very issue it now seeks to foreclose, namely, its right to terminate.

Island Creek in response contends that Article IV, § 6 leaves nothing for resolution by arbitration. It points out that Article VI, § 12 exempts from arbitration matters expressly stated to be within "the sole judgment" of one of the parties, and that Article IV, § 6 is the only section in the entire 43 page agreement

that makes reference to "sole judgment". Secondly, it contends that although it joined in the June 10, 1971 submission, it "in no way" agreed to arbitrate matters which Article IV, § 6 held to be within its sole judgment.

Of the two questions presented, the meaning of "sole judgment" in Article IV, § 6 is by far the more difficult, but it is one which I need not resolve here. For even assuming arguendo that its scope is as broad as Island Creek asserts, I conclude that Island Creek submitted to arbitration its right to terminate under Article IV, § 6 and, having done so, cannot now seek to withdraw from it.

The governing legal principle was best articulated by Judge Clark in Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805 (2nd Cir. 1960), cert. denied, 363 U.S. 843 (1960). Where a disagreement exists over the scope of the arbitration agreement, and where the parties nevertheless voluntarily submit their dispute to arbitration, they "evinc[e] a subsequent agreement for private settlement which would cure any defect in the arbitration clause." The court cited Chief Judge Cardozo in Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co., 253 N.Y. 382 (1930): "We assume that circumstances may exist in which a party to an arbitration, joining in its proceedings without protest or disclaimer, may be found to have joined by implication in the appointment of the arbitrators, and to have confirmed their jurisdiction, if otherwise defective." The Amicizia holding was followed in Ficek v. Southern Pacific Company, 338 F.2d 655 (9th Cir. 1964),

cert. denied, 380 U.S. 988 (1965). The court, while acknowledging that "arbitration is a matter of contract", held that "an agreement to arbitrate a particular issue need not be express — it may be implied from the conduct of the parties. [Plaintiff] concedes that the precise issue which he now seeks to litigate was in fact submitted to the arbitrators. Even if the initial arbitration clause was not broad enough to include [plaintiff's] claim, by voluntarily submitting the dispute to arbitration" the parties had in effect broadened the scope of the initial agreement. See also Foster-Forbes Glass Co. v. Glass Bottle Blowers Association, 263 F.Supp. 729 (N.D. Ind. 1967), holding that the parties' intention to arbitrate could be determined not only by the initial arbitration clause, but also by the text of the submission agreement.

In the instant case the submission agreement of June 10, 1971 leaves little room for interpretation. It begins with a recitation that "[t]he named parties hereby submit the following disputes to arbitration ...." The fourth paragraph following this preamble begins: "Island Creek also contends that it is entitled to terminate its contract with IKEC under the provisions of Article IV, § 6." I can see no other sensible interpretation of this language than as a submission to arbitration of Island Creek's right to terminate under that section. The explanation proffered by Island Creek is that "the inclusion of reference to Article IV, § 6 was intended by the plaintiff to indicate to the arbitrators that in said Agreement the defendant had been allocated the risk of governmental regulations."[4/] That might be charitably characterized as a post hoc

rationalization; in any case, it finds no support in the wording or the structure of the submission agreement. Equally untenable is plaintiff's assertion that it sought termination only under the force majeure clause of the supply agreement and under Article 2-615 of the Uniform Commercial Code. On the contrary, Article IV, § 6 is asserted as the principal basis for termination; the reference to other alleged bases is clearly meant to supplement this argument.

Although I hold that the submission agreement in itself is sufficient to establish the parties' intention to submit the question of Island Creek's right to terminate to arbitration, there is further evidence to support this conclusion. The affidavit of Robert C. Maynard, one of IKEC's attorneys, provides valuable insight into the composition of the submission agreement. The first proposed Submission to Arbitration which he drafted and sent to Island Creek's attorneys made no reference to termination or to any claim or demand by Island Creek for termination. These were added by Island Creek's draftsmen in the amended Submission which they filed in response to IKEC's proposal and they thereafter found their way into the joint submission. In other words, the fourth and fifth paragraphs following the preamble, and the words "Remedy Sought by Island Creek : Termination" were drafted by Island Creek alone. Island Creek has submitted nothing in contradiction of the Maynard account.

The foregoing establishes that the interjection of the issue of the right to terminate under Article IV, § 6 was Island Creek's doing, concurred in by IKEC. I do not by this suggest that the submission could be subject to any other interpretation were

the controverted language that of IKEC; rather, the account of the composition simply provides reassurance that Island Creek was not tricked or coerced into waiving its right, if any, to withhold the question of termination from arbitration. With the authorship of these paragraphs established, it is also not amiss to invoke the rule that a contract must be construed contra proferentem. Having sought the inclusion of this language, Island Creek cannot now disavow it.

I therefore conclude that Island Creek agreed to submit to arbitration the question of its right to terminate under Article IV, § 6. Accordingly, IKEC's motion for summary judgment dismissing the action must be granted.

IT IS SO ORDERED.

Dated: November 21, 1973

U. S. D. J.

Footnotes

1/ Although it is alternatively styled a motion to dismiss pursuant to Rule 12(b)6, both sides make reference to matters outside the pleadings and thus the motion is properly treated as one for summary judgment.

2/ Article IV, § 9:

"The parties hereto recognize the possibility that, during the continuance of this Agreement, legislative or regulatory bodies or the courts may impose regulations or restrictions relating to air pollution which will make it impossible or impractical for Buyer to utilize the coal thereafter to be delivered hereunder. Such regulations or restrictions could pertain to, but would not necessarily be limited to, sulfur. If any such regulations or restrictions are imposed and if as a result thereof Buyer in its sole judgment decides that it will be impossible or impractical for Buyer to utilize the coal to be delivered hereunder, Buyer shall so advise Seller and thereupon Buyer and Seller shall promptly consider what corrective steps they can take in the mining and preparation of the coal at Seller's mine and in the handling and combustion of the coal at Buyer's plant; and if in Buyer's sole judgment such steps will not, without unreasonable expense to Buyer, make it possible for Buyer to utilize the coal thereafter to be delivered hereunder without violating such regulations or restrictions, Buyer shall have the right, upon notice to Seller, to terminate this Agreement without further obligation to Seller hereunder; provided, however, that Seller may, at its option, prevent such termination by agreeing to reimburse Buyer for such expense to the extent that Buyer, in its sole judgment, deems such expense to be unreasonable.

The parties hereto also recognize the possibility that, during the continuance of this Agreement, legislative or regulatory bodies or the courts may impose regulations or restrictions relating to mining practices which will make it impossible or impractical for Seller to continue to produce coal for delivery hereunder. Such regulations or restrictions could pertain to, but would not necessarily be limited to, air pollution, water pollution, waste disposal or surface subsidence. If any such regulations or restrictions are imposed and if as a result thereof Seller in its sole judgment decides that it will be impossible or impractical for Seller to continue to produce coal for delivery hereunder, Seller shall so advise Buyer and thereupon Seller and Buyer shall promptly consider what corrective steps they can take in the mining and preparation

of the coal at Seller's mine and in the handling and combustion of the coal at Buyer's plant; and if in Seller's sole judgment such steps will not, without unreasonable expense to Seller, make it possible for Seller to continue to produce coal for delivery hereunder without violating such regulations or restrictions, Seller shall have the right, upon notice to Buyer, to terminate this Agreement without further obligation to Buyer hereunder; provided, however, that Buyer may, at its option, prevent such termination by agreeing to reimburse Seller for such expense to the extent that Seller, in its sole judgment, deems such expense to be unreasonable."

3/ Article VI, § 12:

"Except as to any matter expressly stated herein to be within the sole judgment of one of the parties hereto, any dispute, controversy or claim arising out of or relating to this Agreement shall be determined by arbitration in accordance with the rules then obtaining of the American Arbitration Association; provided that neither party shall initiate arbitration proceedings until the expiration of thirty (30) days after notice of such dispute, controversy or claim shall have been given to the other party. Judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction."

4/ Affidavit of James G. Park at paragraph 6.

APPENDIX

"AMERICAN ARBITRATION ASSOCIATION
SUBMISSION TO ARBITRATION

Dated: June 10, 1971

The named Parties hereby submit the following disputes to arbitration under the Commercial Arbitration Rules of the American Arbitration Association:

Indiana-Kentucky Electric Corporation (hereinafter referred to as IKEC) claims that Island Creek Coal Sales Company and Island Creek Coal Company (hereinafter collectively referred to as Island Creek) should be required to deliver not less than 2,125,000 nor more than 2,500,000 tons of coal to IKEC during the year 1971 in accordance with a written contract and guarantee dated December 19, 1966, copies of which are attached hereto and marked collectively as Exhibit A.

In addition, IKEC claims damages in an amount which cannot presently be determined for Island Creek's failure to deliver approximately 400,000 tons of coal under the provisions of said contract and guarantee during the year 1970, and approximately 1,000,000 tons of coal during the year 1971.

Island Creek denies that it was or is obligated to produce and deliver to IKEC the aforementioned quantity of coal to IKEC. It contends that the Federal Mine Health and Safety Act of 1969 has made it impossible or impractical for Island Creek to produce at its Hamilton No. 1 Mine and deliver to IKEC the total quantity of coal stated in the contract for the years 1970 and 1971 and that it has been forced to prorate its production from that mine among its long-term contract customers of that mine.

Island Creek also contends that it is entitled to terminate its contract with IKEC under the provisions of Article IV, Section 6. To the extent that termination under Article IV, Section 6 is not available from the first day on account of which IKEC claims damages, Island Creek asserts its right to be excused from performance under the force majeure clause of the contract and under Article 2-615 of the Uniform Commercial Code.

Further, Island Creek asserts that a hardship has occurred whereby Island Creek is prevented from developing the Hamilton No. 1 Mine as planned because of matters beyond its control, namely, government regulations and legislative action, that IKEC has refused to recognize the same, and that therefore the contract should either be equitably adjusted by amendment or terminated.

Remedy Sought by IKEC: Specific Performance and Damages

Remedy Sought by Island Creek: Termination

Amount of Money Involved: Indeterminate

Number of Arbitrators Desired: Three, who shall be attorneys experienced in commercial transactions

Place of Hearing: Cleveland, Ohio

The foregoing contract, Article VI, Section 12, provides as follows:

> 'Except as to any matter expressly stated herein to be within the sole judgment of one of the parties hereto, any dispute, controversy or claim arising out of or relating to this Agreement shall be determined by arbitration in accordance with the rules then obtaining of the American Arbitration Association; provided that neither party shall initiate arbitration proceedings until the expiration of thirty (30) days after notice of such dispute, controversy or claim shall have been given to the other party. Judgment upon the award rendered, may be entered in any court, state or federal, having jurisdiction.'

The parties agree that all notices required by the aforementioned provision have been duly given.

We further agree that we will abide by and perform any decision rendered hereunder and that a judgment may be entered upon the award in any court, state or federal, having jurisdiction.

INDIANA-KENTUCKY ELECTRIC CORPORATION
New York, New York

ISLAND CREEK COAL COMPANY
ISLAND CREEK COAL COMPANY
Cleveland, Ohio"

JUDGMENT DISMISSING COMPLAINT
DECEMBER 10, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendant having moved the Court for summary judgment pursuant to Rule 56(b), Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Arnold Bauman, United States District Judge, and the Court thereafter on November 21, 1973, having handed down its opinion granting the said motion, it is,

ORDERED, ADJUDGED AND DECREED, that defendant, INDIANA - KENTUCKY ELECTRIC CORPORATION, have summary judgment against the plaintiff, ISLAND CREEK COAL SALES COMPANY, dismissing the complaint.

Dated: New York, N.Y.
December 10, 1973

s/ Raymond F. Burghardt
Clerk

COPY RECEIVED

MAY 6 – 1974

CAHILL GORDON & REINDEL

Attorneys For: Defendant

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906

(3031)